(1)

No. 98-9349-CFY Title: Steven Dewayne Bond, Petitioner
v.
United States

Docketed: May 12, 1999 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	May 10 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 3, 1999)
	May 25 1999	Waiver of right of respondent United States to respond filed.
	Jun 2 1999	DISTRIBUTED. June 17, 1999
	Jun 4 1999	Response requested. (Due July 5, 1999 - NONE RECEIVED)
	Jul 6 1999	Order extending time to file response to petition until August 4, 1999.
	Aug 3 1999	Order further extending time to file response to petition until September 3, 1999.
	Sep 3 1999	Brief of respondent United States in opposition filed.
	Sep 15 1999	Reply brief of petitioner Steven D. Bond filed.
	Sep 16 1999	REDISTRIBUTED. October 8, 1999
	Sep 16 1999	Letter of respondent United States filed.
	Oct 12 1999	Petition GRANTED. limited to Question 1 presented by the petition. SET FOR ARGUMENT February 29, 2000. **********
	Nov 4 1999	Record filed.
	Nov 15 1999	Record filed.
	Nov 24 1999	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Nov 24 1999	Brief of petitioner Steven D. Bond filed.
	Nov 24 1999	Brief amicus curiae of Pro Bono Criminal Assistatnce Project filed.
	Nov 26 1999	Joint appendix filed.
	Dec 16 1999	Order extending time to file respondent's brief on the merits to and including January 7, 2000.
	Dec 17 1999	CIRCULATED.
	Jan 3 2000	Brief amicus curiae of National Association of Police Organizations filed.
	Jan 7 2000	Brief of respondent United States filed.
	Feb 11 2000	Reply brief of petitioner filed (TBP).
	Feb 29 2000	ARGUED.

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No. 98-9349

In the Supreme Court of the United States

October Term, 1998

STEVEN DEWAYNE BOND, PETITIONER,

v.

UNITED STATES OF AMERICA

Supreme Court, U.S.
FILED
MAY 10 1999
OFFICE OF THE CLERK

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES Petitioner Steven Dewayne Bond, by and through his undersigned attorney, and pursuant to Rule 39.1, Supreme Court Rules, and Title 18, United States Code, § 3006A(d)(6), respectfully moves this Honorable Court for leave to proceed *in forma pauperis,* and to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of fees. Petitioner was represented by appointed counsel under the Criminal Justice Act of 1964, as amended, in the district court and the court of appeals. Leave to proceed *in forma pauperis* was never sought in any other court.

Respectfully submitted.

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DATED: May 10, 1999.

(10)

QUESTIONS PRESENTED FOR REVIEW

1. Whether a search occurs when a law enforcement officer manipulates a bus passenger's personal carry-on luggage to determine its contents.
2. Whether the strict limits that this Court has set for an immigration checkpoint stop are violated by the detention of bus passengers so that their luggage may be manipulated to inspect for drugs.

No. _____

In the Supreme Court of the United States

October Term, 1998

STEVEN DEWAYNE BOND, PETITIONER,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Steven Dewayne Bond respectfully prays that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on February 8, 1999.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit, styled *United States v. Bond*, 167 F.3d 225 (5th Cir. 1999), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on February 8, 1999. This petition is filed within 90 days after entry of judgment. See SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Petitioner Steven Dewayne Bond was convicted of methamphetamine conspiracy and possession offenses. The district court exercised jurisdiction under 18 U.S.C. § 3231.

Bond was a passenger on a Greyhound bus that was stopped at the permanent immigration checkpoint at Sierra Blanca, Texas. The bus had

traveled from California through El Paso, Texas, and was en route to Arkansas.

Border Patrol Agent Cesar Cantu Jr. was on duty at the Sierra Blanca checkpoint when Bond's bus arrived. In accordance with his routine, the agent diverted the bus into the secondary traffic lane so that he could board it to conduct an immigration inspection.

The bus, which could accommodate at least 45 passengers, was nearly full. Agent Cantu worked his way to the back of the bus, checking the passengers' immigration status. Upon completion of his immigration inspection, Agent Cantu was satisfied that everyone on the bus was lawfully in the United States.

Rather than walking directly to the front of the bus and disembarking, Agent Cantu began working his way forward, stopping to feel and squeeze passengers' luggage to inspect for illegal drugs. Cantu manipulated carry-on luggage in the overhead bins, and under passengers' seats; he sometimes had to ask passengers to move so that he could reach the luggage under the seats.[1]

When Agent Cantu came to the row in which Bond was seated, he reached into the overhead bin above Bond's seat to manipulate a green

1. Agent Cantu could not remember whether the bins were open, or closed-type compartments with a door and a latch. He testified that, if the bins were of the closed-type, he would have required all of them to be opened so that he could feel bags stowed in the bins.

canvas bag. Nothing about Bond or Jason Wiggs, seated next to him, had drawn Cantu's attention. Cantu had simply squeezed the green canvas bag as part of his general effort to feel as many bags as he could.

The shape of a "brick-like" object that Agent Cantu felt in Bond's green canvas bag led him to suspect that it contained drugs. Cantu asked who owned the green bag, and Bond replied that the bag was his. When Cantu asked if he could open the bag, Bond said "go ahead."

Agent Cantu opened Bond's bag and found, wrapped inside a pair of pants, a brick-shaped object, covered in tape. The agent then determined that Wiggs was travelling with Bond, and he removed both men and their luggage from the bus. He found another brick-like object in Wiggs's luggage. Chemical field tests revealed that the objects contained methamphetamine.

Agent Cantu advised both men of their *Miranda* rights[2] and questioned them. Bond admitted that he possessed the methamphetamine and gave the agent details about how he had come to have the drugs. Wiggs too admitted guilt.[3] Each confessed again later, after another advisement of rights.

2. *Miranda v. Arizona*, 384 U.S. 436 (1966).

3. Wiggs was indicted with Bond, but Wiggs's motion to suppress evidence was granted. The district court found that Agent Cantu unlawfully arrested Wiggs because he had no reason to suspect Wiggs of wrong doing when he removed Wiggs and his luggage from the bus. App. B at 5–6. After Wiggs's motion to suppress was granted, the case against him was dismissed.

Bond filed a motion to suppress the methamphetamine and his confessions. The motion to suppress was denied, as was Bond's motion to reconsider it. Apps. B, C. He consented to a bench trial before the district court and was found guilty. Bond appealed.

On appeal, Bond argued that the agent's inspection of his luggage violated the Fourth Amendment in two ways. First, the agent's manipulation of Bond's carry-on luggage to determine whether it contained illegal drugs was a search, conducted without probable cause or consent. Second, the detention of the bus and its passengers after the immigration inspection was concluded exceeded the strict limits for permanent checkpoint inspections that were set by this Court in *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976).

The U.S. Court of Appeals for the Fifth Circuit rejected both of these contentions. The court held that Agent Cantu's manipulation of Bond's luggage was not a search for Fourth Amendment purposes. 167 F.3d at 227. It also ruled that "[w]e do not read *Martinez-Fuerte* to mean that once Agent Cantu reached the back of the bus, he was required to jump out a window or sprint back to the front of the bus and jump out the door." *Id.* at 228. It therefore decided that Cantu was permitted to squeeze and feel luggage on his way out of the bus to inspect for drugs. The court concluded that neither the delay caused by Cantu's inspection nor the manipulation of luggage violated the strict limits of a permanent checkpoint stop. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DIVIDED ABOUT WHETHER A SEARCH OCCURS WHEN A LAW ENFORCEMENT OFFICER MANIPULATES A BUS PASSENGER'S CARRY-ON LUGGAGE TO DETERMINE ITS CONTENTS.

In a relatively new tactic in the war on drugs, police officers board commercial buses while they are stopped at a terminal and inspect the passengers' luggage for illegal drugs. Without consent, probable cause, or even reasonable suspicion of criminal activity, the officers squeeze, feel, and manipulate the personal carry-on luggage of bus passengers in search of suspicious shapes or objects that may indicate the presence of drugs.[4]

Federal border patrol agents have followed suit. When commercial buses are stopped at a permanent checkpoint for a routine immigration inspection, agents take the opportunity to feel and squeeze passengers' luggage in search of illegal drugs. The Fifth Circuit Court of Appeals approved this practice in Bond's case, ruling that the manipulation of a passenger's personal carry-on luggage to determine if it contains illegal drugs does not constitute a search within the meaning of the Fourth Amendment. Thus, agents need neither probable cause nor even reasonable suspicion to squeeze and feel luggage to determine its contents. *United States v. Bond,* 167 F.3d 225, 227

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4. See *United States v. Nicholson,* 144 F.3d 632 (10th Cir. 1998) (Oklahoma City police board Greyhound bus during regularly scheduled stop and manipulate luggage in overhead bins as part of drug interdiction effort); *United States v. McDonald,* 100 F.3d 1320 (7th Cir. 1996) (Indianapolis police do same), *cert. denied,* 520 U.S. 1258 (1997).

(5th Cir. 1999); *accord United States v. McDonald,* 100 F.3d 1320, 1322, 1324–27 (7th Cir. 1996) (police officer's "pushing and feeling" of bags in overhead bins of Greyhound bus not a search under Fourth Amendment), *cert. denied,* 520 U.S. 1258 (1997).

The Tenth Circuit disagrees. Condemning what it termed the "suspicionless police sweep of a bus in interstate travel," that court has held that a police officer's manipulation of luggage to determine whether it contained drugs is a "search" subject to Fourth Amendment constraints. *United States v. Nicholson,* 144 F.3d 632, 638–40 (10th Cir. 1998); *cf. United States v. Most,* 876 F.2d 191, 194, 197–99 (D.C. Cir. 1989) (police officer's investigative touching of shopping bag checked with store was search).

Because the courts of appeals are in conflict about whether a search occurs when a law enforcement officer manipulates a traveler's personal carry-on luggage, this Court should grant certiorari. This issue has broad application and implicates fundamental questions about the important protections afforded by the Fourth Amendment to the United States Constitution.

A. A Search Occurs When a Border Patrol Agent Feels and Squeezes Carry-On Luggage to Determine Its Contents.

The Fourth Amendment protects the "right of the people to be secure in their . . . effects, against unreasonable searches." U.S. CONST. amend. IV. For purposes of the Fourth Amendment, a search occurs when

government officials infringe upon an individual's legitimate expectation of privacy. *See United States v. Jacobson,* 466 U.S. 109, 120 (1984). As this Court has explained, "application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland,* 442 U.S. 735, 740 (1979) (internal citations omitted).

Travelers, like Bond, have a legitimate expectation of privacy in their personal luggage, an expectation that the Fourth Amendment protects. *See United States v. Chadwick,* 433 U.S. 1, 13 (1977) (expectation of privacy in luggage as repository of personal effects), *abrogated on other grounds, California v. Acevedo,* 500 U.S. 565 (1991).[5] The Fifth Circuit concluded that Bond gave up any reasonable expectation of privacy in his carry-on bag because he "exposed it to the public" by placing it in the luggage bin directly over his head. 167 F.3d at 227. In the Fifth Circuit's view, Bond "did not have a reasonable expectation that his bag would not be handled or manipulated by others." *Id.*

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5. In *Acevedo,* this Court analyzed inconsistent Supreme Court authority governing the search of containers in automobiles—authority that included the *Chadwick* case. 500 U.S. at 561–80. It announced the new rule that "[t]he police may search automobiles and the containers within it where they have probable cause to believe contraband or evidence is contained." 500 U.S. at 580.

The Fifth Circuit's holding appears contrary to fundamental constitutional principles. The Fourth Amendment protects people, not places or even things. *See Katz v. United States,* 389 U.S. 347, 351 (1967). Thus, what a person "seeks to protect as private, even in an area accessible to the public, may be constitutionally protected." *Id.* By placing his personal carry-on luggage directly over his seat, in the internal baggage compartment of a Greyhound bus, Bond manifested his reasonable and legitimate expectation that the contents of his luggage would remain private.[6]

Of course, placing a bag in an overhead luggage bin of a Greyhound bus will expose it to certain intrusions. Other passengers may push and move the bag as they try to make room for their own belongings. However, Agent Cantu's squeezing and feeling of Bond's bag to determine whether it contained drugs was not the sort of handling that Bond would reasonably expect from other passengers. No traveler on a common carrier expects that other passengers will feel and squeeze his luggage to determine its contents. *See Nicholson,* 144 F.3d at 639 (bus traveler had reasonable expectation that police would not manipulate carry-on luggage to determine its contents); *Most,* 876 F.2d at 195–97 & n.13 (grocery store shopper had reasonable

6. There was testimony in the district court that the luggage bin was a closed-type bin, similar to those found in airplanes. The Fifth Circuit found that the "record is unclear as to whether the . . . bin was of the open or closed type." 167 F.3d at 227 n.1. However, the court concluded that "since both types of bins were accessible to the general public . . . the distinction between open and closed luggage bins is irrelevant for Fourth Amendment purposes." *Id.*

expectation that police would not use "crush technique" to feel drugs inside bag checked with clerk).

Agent Cantu's probing hands invaded Bond's carry-on luggage and revealed its contents. The agent felt and squeezed the contents of Bond's bag hard enough to know that the bag contained a brick-like object with "an outline of something of different mass inside of it"—an object Cantu believed to contain drugs. Thus, at least one item in Bond's luggage—a brick-like object that Cantu believed to contain drugs—was revealed through the agent's sense of touch.

Squeezing or manipulation such as that undertaken by Agent Cantu could have revealed the presence of books, magazines, a compact disc player or radio, eye glasses, clothing, medicine containers, a package of cigarettes, a pipe, a hair brush, comb, or other toiletry items, or a myriad of other objects commonly found in personal hand luggage. As this Court has observed, "[a] search is a search," and "it matters not that the search uncovered nothing of any great personal value" to the person searched. *Arizona v. Hicks,* 480 U.S. 321, 325 (1987). Agent Cantu's manipulation of Bond's carry-on luggage was a search that revealed the bag's contents, including a brick-like object that was later found to contain drugs.

In sum, Agent Cantu's manipulation of Bond's carry-on baggage to discover its contents was a search because it invaded a legitimate expectation of privacy. A traveler who checks his bags with a commercial carrier may

expect that his bags will receive rough handling. A traveler who keeps his bags with him while he travels may expect the more minimal handling that occurs if fellow travelers have to move luggage to make room for their own. No traveler, however, expects that others will squeeze or feel his carry-on luggage in a manner that is intended to reveal the contents of that luggage. When a government agent boards a Greyhound bus, reaches into baggage bins and under seats, and conducts an inspection of luggage by squeezing passengers' bags, he invades the legitimate expectation of privacy that a person has in his personal luggage and its contents.

B. Certiorari Should be Granted Because of the Importance of the Issue and Disagreement Among the Circuits.

By its decision in Bond's case, the Fifth Circuit joined the Seventh Circuit in holding that no search occurs when a law enforcement officer manipulates a traveler's personal carry-on luggage to determine its contents. See *McDonald,* 100 F.3d at 1327. The Tenth Circuit has held to the contrary. In *Nicholson,* that court ruled that a law enforcement officer's manipulation of a carry-on bag to inspect for drugs is a search within the meaning of the Fourth Amendment. 144 F.3d at 639.[7]

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7. The salient facts of all three cases, *Bond, Nicholson,* and *McDonald*, are nearly identical: all three were travelers on a Greyhound bus; all had their carry-on luggage manipulated by law enforcement officers looking for drugs; all the initial drug inspections were conducted without reasonable suspicion, probable cause, or consent.

The importance of this issue was aptly summed up by Seventh Circuit Judge Ripple as "a milestone in the unfolding of . . . Fourth Amendment jurisprudence[.]" *McDonald,* 100 F.3d at 1333 (Ripple, J., dissenting). And the "practical consequences" of the issue "are no less substantial than the doctrinal ones." *Id.* "From now on, law enforcement officials" in the Fifth and Seventh Circuits, "without probable cause, or even reasonable suspicion, may walk throughout public buses and trains and randomly manipulate closed luggage to determine its contents." *Id.* Judge Ripple and the Tenth Circuit believe that "the Fourth Amendment protects people in the United States from such an intrusion into their personal belongings." *Id.* at 1229; *see Nicholson,* 144 F.3d at 639–40. The Fifth and Seventh Circuits do not. This Court should grant certiorari to settle this dispute among the circuits and to clarify this important Fourth Amendment issue.

II. This Case Presents the Important Federal Question Whether the Strict Limits Attending Immigration Checkpoint Stops Are Exceeded, and the Fourth Amendment Violated, When Government Agents Detain Travelers to Inspect Their Luggage for Drugs.

In *United States v. Martinez-Fuerte,* 428 U.S. 543, 558 (1976), this Court approved brief stops of vehicles at fixed checkpoints to allow limited questioning of passengers about immigration matters. The brief detention may last only long enough to ask questions and check citizenship status. *See id.* As Agent Cantu's testimony showed, border patrol agents routinely exceed *Martinez-Fuerte*'s strict limits at the Sierra Blanca checkpoint by

extending the detention of bus passengers in order to inspect their luggage. The agents inspect luggage both under seats and in overhead bins by squeezing it to determine whether it contains drugs. If the overhead bins are closed, the agents open them so they can reach all of the passengers' carry-on luggage.

Martinez-Fuerte imposed strict limits on stops at immigration check-points. It did so because *Martinez-Fuerte* created an exception to the general rule that the seizure of a person must be based on reasonable suspicion. As a general matter, law enforcement officers must have a particularized and reasonable suspicion that an individual is engaged in criminal activity before they may require a person to stop and answer questions. *See Terry v. Ohio*, 392 U.S. 1, 21 & n.18 (1968). In *Martinez-Fuerte*, however, this Court approved stops at permanent immigration checkpoints, without reasonable suspicion, because the need for enforcement of immigration laws was great, and the intrusion on the rights of private citizens was modest. *See* 428 U.S. at 560–62.

Thus, checkpoint detentions without reasonable suspicion comport with the Fourth Amendment only if they comply with *Martinez-Fuerte*'s strict limits. *See* 428 U.S. at 566–67 ("The principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop."). The limits imposed by this Court were that the detention be brief, and that the requirements imposed on passengers be limited to a

"question or two and possibly the production of a document evidencing a right to be in the United States." *Id.* at 558. The Court forbade "any further detention" without consent or probable cause. *Id.* at 567.

In this case, the detention was not brief, and the requirements imposed on passengers were not limited to questions about immigration matters. After the sanctioned immigration inspection was completed, a busload of about 45 passengers was detained while a border patrol agent worked his way through the bus, squeezing as many bags as he could to determine if there were drugs on board. Passengers were also required to move out of his way, so that the agent could inspect carry-on luggage stored under their seats; luggage stored overhead also was manipulated to determine its contents.

The Fifth Circuit ruled that the agent's actions did not violate the Fourth Amendment because the luggage inspection caused only a trivial delay. 167 F.3d at 228. Further the court reasoned that, as the bus had no rear exit, Agent Cantu was not "required to jump out a window or sprint back to the front of the bus and jump out the door." *Id.*

Bond contends that this ruling does not comport with *Martinez-Fuerte*'s strict limits; instead, the Fifth Circuit has effectively expanded the narrow scope of a permanent checkpoint stop. This Court should grant certiorari to address this important question of federal law.

CONCLUSION

Petitioner Bond asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.

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DATED: May 10, 1999.

APPENDIX A

United States v. Bond,
167 F.3d 225 (5th Cir. 1999)

546. Accordingly, the district court did not err in this regard.

VI. CONCLUSION

Based on the foregoing, we VACATE the appellants' convictions for wire fraud under counts three and four, but AFFIRM the appellants' remaining convictions. We also VACATE the appellants' sentences and REMAND to the district court for resentencing consistent with this opinion.

UNITED STATES of America, Plaintiff–Appellee,

v.

Steven Dewayne BOND, Defendant–Appellant.

No. 98–50074.

United States Court of Appeals, Fifth Circuit.

Feb. 8, 1999.

Defendant was convicted in the United States District Court for the Western District of Texas, Harry Lee Hudspeth, Chief Judge, of conspiracy to possess and possession with intent to distribute methamphetamine, and he appealed, challenging denial of his suppression motion. The Court of Appeals, Duhe, Circuit Judge, held that: (1) Border Patrol agent did not subject defendant's bag to a search for Fourth Amendment purposes when he squeezed bag while conducting immigration inspection of bus in which defendant was a passenger, and (2) agent did not violate limitations on border checkpoint stops.

Affirmed.

1. Criminal Law ⇐1139, 1158(4)

In reviewing a district court's denial of a defendant's motion to suppress, Court of Appeals reviews factual findings for clear error and conclusions of law de novo.

2. Criminal Law ⇐1144.12

In reviewing a district court's denial of a defendant's motion to suppress, Court of Appeals reviews the evidence in the light most favorable to the prevailing party.

3. Searches and Seizures ⇐13.1

Border Patrol agent did not subject defendant's bag to a search for Fourth Amendment purposes when he squeezed bag while conducting immigration inspection of bus in which defendant was a passenger, where bag had been placed in overhead luggage bin which was accessible to the general public. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐13.1

Border Patrol agent's manipulation of bags stored in bus' overhead luggage bin in a manner calculated to detect contraband while he conducted immigration inspection of bus in which defendant was a passenger did not make his manipulation of defendant's bag a search for Fourth Amendment purposes, although other passengers would not have manipulated the bag in the same way. U.S.C.A. Const.Amend. 4.

5. Customs Duties ⇐126(4)

Border Patrol agent who conducted immigration inspection of bus at border checkpoint did not violate limitations on border checkpoint stops when he squeezed luggage in overhead luggage bin on his out of the bus after concluding that all passengers were lawfully in the United States, where bus had no rear exit and agent's inspection of the luggage on his way to the front of the bus delayed its departure by only one or two minutes. U.S.C.A. Const.Amend. 4.

6. Customs Duties ⇐126(4)

Border Patrol agent conducting immigration inspection of bus at border checkpoint could conduct tactile, rather than visual inspection of luggage in overhead luggage bin without exceeding limits of border checkpoint stops. U.S.C.A. Const.Amend. 4.

Joseph H. Gay, Jr., U.S. Atty., Margaret Feuille Leachman, San Antonio, TX, for Plaintiff–Appellee.

M. Carolyn Fuentes, San Antonio, TX, for Defendant–Appellant.

Appeal from the United States District Court for the Western District of Texas.

Before KING, Chief Judge, and DUHÉ and DeMOSS, Circuit Judges.

DUHÉ, Circuit Judge:

Drugs were found in Appellant's luggage at a border checkpoint. He appeals the denial of his Motion to Suppress. We affirm.

BACKGROUND

Stephen DeWayne Bond ("Bond") was a passenger on a Greyhound bus that was stopped at the permanent Border Patrol checkpoint at Sierra Blanca, Texas. Border Patrol Agent Cesar Cantu ("Agent Cantu") diverted the bus into the secondary checkpoint traffic lane to conduct an immigration inspection.

Agent Cantu checked the immigration status of the passengers as he worked his way toward the back of the bus. After he reached the back of the bus and was satisfied that the passengers were lawfully in the United States, Agent Cantu walked back toward the front of the bus. As he did so, he began feeling and squeezing passengers' luggage in the overhead compartments.

As Agent Cantu inspected the luggage in the compartment above Bond's seat, he squeezed a green bag and noticed that the bag contained a "brick-like" object. Bond admitted that the bag was his and consented to its search. While searching the bag, Agent Cantu discovered a "brick" of methamphetamine. After Bond was advised of his *Miranda* rights, Bond admitted that he was transporting the methamphetamine to Little Rock, Arkansas.

Bond was indicted for conspiracy to possess and possession with intent to distribute methamphetamine. Contending that Agent Cantu conducted an illegal search, Bond unsuccessfully moved to suppress the methamphetamine and for reconsideration. Bond waived a jury trial and the district court found Bond guilty on both counts of the indictment and sentenced him to 57 months imprisonment. Bond appeals the denial of his motion to suppress.

DISCUSSION

[1, 2] In reviewing a district court's denial of a defendant's motion to suppress, we review factual findings for clear error and conclusions of law *de novo*. *See United States v. Carrillo-Morales*, 27 F.3d 1054, 1060–61 (5th Cir.1994). We review the evidence in the light most favorable to the prevailing party. *United States v. Ishmael*, 48 F.3d 850, 853 (5th Cir.1995).

Bond consented to the search of the inside of his bag, therefore, we consider only whether Agent Cantu violated Bond's Fourth Amendment rights prior to Bond's consent to the search. For the following reasons, we conclude that Agent Cantu did not.

I. Whether Squeezing Bond's Luggage Constituted a Search for Fourth Amendment Purposes?

[3] "Government action amounts to a search when it infringes an expectation of privacy that society is prepared to accept as reasonable." *U.S. v. McDonald*, 100 F.3d 1320, 1324 (7th Cir.1996), *cert. denied*, 520 U.S. 1258, 117 S.Ct. 2423, 138 L.Ed.2d 186 (1997) (citing *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984)). However, "[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).

Bond insists that Agent Cantu's manipulation of his bag constituted a search for Fourth Amendment purposes. We disagree. Bond stored his bag in the overhead luggage bin of a Greyhound bus.[1] The bin was a

1. The record is unclear as to whether the overhead luggage bin was of the open or closed type. Both types of bins are accessible to the general public. Therefore, we conclude that the distinc-

common area of the bus, and it was foreseeable that his bag would be squeezed, moved, and manipulated by others. On common carriers, passengers often handle and manipulate other passengers' luggage while stowing or retrieving their own luggage. By placing his bag in the overhead bin, Bond knowingly exposed it to the public and, therefore, did not have a reasonable expectation that his bag would not be handled or manipulated by others.[2] *See McDonald*, 100 F.3d at 1327 (holding that officer's manipulation of bags on the overhead rack of a Greyhound bus was not a search because the defendant "did not have a legitimate expectation that her luggage left in such a place would not be handled by others."); *U.S. v. Guzman*, 75 F.3d 1090, 1095 (6th Cir.1996) (holding that the defendant did not have a reasonable expectation of privacy in the exterior of a bag that he placed on the luggage rack of a Greyhound bus); *United States v. Harvey*, 961 F.2d 1361, 1364 (8th Cir.1992) (stating that "[p]assengers have no objective, reasonable expectation that their baggage will never be moved once placed in an overhead compartment."); *see also United States v. Lovell*, 849 F.2d 910, 915 (5th Cir.1988) (holding that manipulation of the defendant's baggage on an airport baggage carousel was not a search because the defendant did not have a reasonable expectation that the baggage would not be moved or handled); *but see United States v. Nicholson*, 144 F.3d 632, 639 (10th Cir.1998) (holding that the manipulation of luggage stored in an overhead luggage bin was a search within the meaning of the Fourth Amendment).

[4] Conceding that other passengers had access to his bag, Bond contends that Agent Cantu's actions constituted a search because Agent Cantu manipulated his bag in a different way than other passengers would. *See U.S. v. Nicholson*, 144 F.3d 632, 639 (10th Cir.1998) (reasoning that manipulation of the defendant's bag constituted a search because detectives squeezed the bag in a way that revealed more about the bag's contents than manipulation by other passengers may have). We reject this argument. The fact that Agent Cantu's manipulation of Bond's bag was calculated to detect contraband is irrelevant for Fourth Amendment purposes. In *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 1813–14, 90 L.Ed.2d 210 (1986), the Supreme Court held that a defendant who grew marijuana plants in his backyard knowingly exposed those plants to aerial observation. The Court observed that the fact that "the observation from [the] aircraft was directed at identifying the plants and the officers were trained to recognize marijuana [was] irrelevant." *Id.* at 1813. Accordingly, we hold that Agent Cantu's manipulation of Bond's bag was not a search within the meaning of the Fourth Amendment.

II. *Whether the Luggage Inspection at the Checkpoint Exceeded the Limits Imposed by United States v. Martinez-Fuerte?*

[5] Bond insists that the continued detention of the bus and its passengers after the immigration inspection was completed exceeded the strict limits for such inspections set forth by the Supreme Court in *United State v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). He argues that detentions may last only long enough to ask questions and check citizenship status. *See United States v. Jackson*, 825 F.2d 853, 862 (5th Cir.1987). Noting that the *Martinez-Fuerte* Court forbade further detention without consent or probable cause, Bond maintains that Agent Cantu's luggage inspection occurred after he concluded that all passengers on the bus were lawfully in the United States and was, therefore, impermissible. *See Martinez-Fuerte*, 96 S.Ct. at 3087.

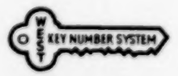
We reject Bond's reading of *Martinez-Fuerte*. In the case at bar, the bus had no rear exit and Agent Cantu inspected the luggage compartment during his return to the front of the bus. There is no evidence that Agent Cantu's inspection of the overhead luggage compartment delayed the bus' departure more than an additional one or two minutes.[3] We do not read *Martinez-Fuerte* to mean that once Agent Cantu reached the back of the bus, he was required to jump out a window or sprint back to the front of the bus and jump out the door. Therefore, we conclude that the trivial delay caused by Agent Cantu's inspection did not violate the strict limits of a border checkpoint stop. *See United States v. Muniz-Melchor*, 894 F.2d 1430, 1432, 1436–37 (5th Cir.1990) (tapping on the side of a truck's propane tank at a checkpoint was permissible even though the driver had already produced valid documentation).

[6] Although Bond concedes that *Martinez-Fuerte* allows a visual inspection of areas that can be seen without a search, he contends that Agent Cantu's inspection was impermissible because it went beyond a visual inspection of the bus. *See Martinez-Fuerte*, 96 S.Ct. at 3083 (stating that, in a border checkpoint stop, "[n]either the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search."). We disagree. We have repeatedly permitted checkpoint inspections that were not visual but did not constitute searches. *See, e.g., United States v. Hernandez*, 976 F.2d 929, 930 (5th Cir.1992) (permitting dog sniff at checkpoint); *Muniz-Melchor*, 894 F.2d at 1435–37 (holding that tapping on the side of a truck's propane tank at a checkpoint was permissible). Because Agent Cantu's inspection was not a search, the fact that it was tactile rather than visual did not make it impermissible.

CONCLUSION

We affirm the denial of Bond's motion to suppress.

AFFIRMED.



tion between open and closed luggage bins is irrelevant for Fourth Amendment purposes.

2. We have upheld similar searches in two unpublished opinions,. *See United States v. Cook*, 992 F.2d 323, 1993 WL 152244 (5th Cir.1993); *United States v. Wilson*, 987 F.2d 770, 1993 WL 67230 (5th Cir.1993); *see* 5th Cir. R. 47.5.3.

3. In fact, the entire stop lasted only between five and ten minutes.

Marie PFAU, Plaintiff-Appellant,

v.

William REED, In His Official Capacity as Director of the Defense Contract Audit Agency, Defendant-Appellee.

No. 96-50916.

United States Court of Appeals,
Fifth Circuit.

Feb. 8, 1999.

Former employee sued director of federal agency and others for sexual harassment and intentional infliction of emotional distress. The United States District Court for the Western District of Texas, Alan D. Albright, United States Magistrate Judge, granted summary judgment for director. Employee appealed. The Court of Appeals, King, Circuit Judge, 125 F.3d 927, affirmed. Employee sought review. The Supreme Court, — U.S. —, 119 S.Ct. 32, 142 L.Ed.2d 24, vacated judgment and remanded. The Court of Appeals held that District Court would be required on remand to reconsider, in light of recent United States Supreme Court decisions, whether certain co-employee was employee's supervisor, and, if so, whether employer established affirmative defense outlined in those cases.

Affirmed in part; vacated and remanded in part.

Federal Courts ⇐943.1

District court would be required on remand to reconsider, in light of United States Supreme Court decisions in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, whether certain co-employee was employee's supervisor, and, if so, whether employer established affirmative defense to claim of employer's liability for sexual harassment outlined in those cases. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

APPENDIX B

District Court's Order Regarding
Defendants' Motions to Suppress Evidence,
October 23, 1997

FILED
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CLERK, U.S. DISTRICT
BY

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	§	
	§	
v.	§	No. EP-97-CR-682-H
	§	
STEVEN DEWAYNE BOND	§	
JASON MICHAEL WIGGS	§	

ORDER REGARDING DEFENDANTS' MOTIONS TO SUPPRESS EVIDENCE

Defendants Steven Dewayne Bond and Jason Michael Wiggs are charged in a two-count indictment with conspiring to possess methamphetamine and possession of methamphetamine with intent to distribute it. Both Defendants have filed motions to suppress as evidence all fruits of the search of their personal belongings at the Sierra Blanca checkpoint on July 17, 1997. Both Defendants also move to suppress as evidence the statements or confessions attributed to them following their arrest, contending that these are fruits of the poisonous tree.

The testimony of the witnesses at the evidentiary hearing was in conflict. The Court, in its role as fact finder, has been required to make findings of fact as to exactly what occurred. These findings of fact are reflected in the opinion that follows.

Cesar Cantu is a Border Patrol agent stationed at Sierra Blanca, Texas. On July 17, 1997, he was on duty at the Sierra Blanca checkpoint, a Border Patrol checkpoint located on Interstate 10 approximately 85 miles east of El Paso, Texas. At approximately 7:55 p.m. on that date, a Greyhound bus from El Paso arrived at the checkpoint. Agent Cantu got on the bus to check the citizenship or other status of its occupants. He went row by row to the back of the bus, and discovered no undocumented aliens. On his way back to

the front of the bus, Agent Cantu checked the luggage racks above the heads of the seated passengers. This check was not visual only; on occasion he reached in with his hand and felt the suitcases, clothing bags, backpacks, or other items contained in the luggage rack. Four or five rows from the rear of the bus, Agent Cantu felt a bricklike object in a softsided green cloth bag. Based on his experience, he thought the bricklike object might be a package of drugs. He immediately asked to whom the green bag belonged. Defendant Steven Dewayne Bond, who was seated in an aisle seat immediately below the green bag, admitted that the bag was his. Bond also struck Agent Cantu as acting somewhat nervous. Agent Cantu asked Bond for consent to search the bag, and Bond gave his consent. Cantu unzipped the green bag and looked inside. Inside the leg of a pair of pants, he found the bricklike object he had felt. Closer examination revealed an oval mass, wrapped in gray duct tape with rounded corners, six or seven inches long by four or five inches wide. Agent Cantu then asked the passenger in the window seat, Defendant Wiggs, whether he was travelling with Bond. Wiggs said that he was. Cantu then removed a backpack from the luggage rack and asked if it belonged to Wiggs. Wiggs said that it did. Agent Cantu then directed both Bond and Wiggs to get off the bus with the two bags. The two young men were turned over to another Border Patrol agent while Agent Cantu completed his inspection of the bus. At that time, the two young men were taken inside the office for questioning. The bus driver was cleared to leave, and the Greyhound bus proceeded on its way. Agent Cantu

came inside the office and confronted the two Defendants. He asked Wiggs for consent to search his backpack, and Wiggs gave it. Inside the backpack was another bricklike object, similar to the one found in Bond's bag. Some of the contents were field tested, and proved positive for methamphetamine. Each brick weighed approximately 1.3 pounds. Agent Cantu then advised both Defendants of their constitutional rights, and they agreed to answer questions. Defendant Bond did most of the talking. He said he was travelling from California to Little Rock, Arkansas, and was transporting the methamphetamine on behalf of a person named Tony Alvarez whom he knew in California. He was to deliver the methamphetamine to someone at a Holiday Inn motel in Little Rock, return to California, and be paid. He admitted that he knew that the bricks contained methamphetamine. Defendant Wiggs did not do much talking. He mostly nodded assent as Bond did the talking. He said nothing to contradict the story being told by Bond.

Agent Cantu contacted the office of the Drug Enforcement Administration in El Paso, and an agent responded to the checkpoint. He reinterviewed the Defendants, and obtained a similar story. Defendant Bond stated that an acquaintance in Merced, California named Tony Alvarez learned that Bond was travelling to Little Rock to visit relatives. Alvarez requested Bond to transport the methamphetamine for a fee. Bond gave his pager to Tony Alvarez, and the understanding was that Bond would "beep" Tony upon his arrival in Little Rock, Arkansas. This time Defendant Wiggs gave a separate statement, admitting that he was

knowingly transporting methamphetamine on behalf of Tony Alvarez. He was present at Bond's residence when the parties agreed to the plan, and he heard all of Alvarez' instructions to Bond. Both Defendants were taken into custody and returned to El Paso where they were later indicted.

There is no question that the initial inspection of the bus by Border Patrol Agent Cantu was legitimate and routine. Agents of the Border Patrol have the authority within 100 miles of the international boundary to stop vehicles at checkpoints and verify the citizenship and/or legal status of their occupants. 8 U.S.C. § 1357(a)(3). In the course of making that inspection, Agent Cantu was authorized to look in the luggage compartments as well. In the process, he felt the outside of Bond's softside green cloth bag. In doing so, he felt the presence of a solid mass reminiscent of a brick. **See: United States v. Karman,** 849 F.2d 928, 929 (5th Cir. 1988). It is well settled that the minimally intrusive touching of the exterior of a bag located in the luggage compartment of a common carrier is neither a search nor a seizure within the meaning of the Fourth Amendment. **United States v. Lovell,** 849 F.2d 910 (5th Cir. 1988); **United States v. Garcia,** 849 F.2d 917 (5th Cir. 1988). Agent Cantu then asked a question about ownership, and Bond replied that the bag was his. Agent Cantu requested Bond's consent to a search of the bag, and Bond gave it. A search by consent is a well recognized exception to the usual warrant requirement. **Schneckloth v. Bustamonte,** 412 U.S. 218 (1973). The Court finds from a preponderance of the evidence that Bond's consent to the

search of his bag was voluntary. **United States v. Hurtado,** 905 F.2d 74 (5th Cir. 1990) (en banc). Although Bond testified at the hearing on his motion to suppress evidence, he did not really contend that his consent was not voluntary. All he could do was to express his belief that Agent Cantu would have obtained a search warrant if he had not consented. Once the brick was found, Agent Cantu had probable cause to arrest Bond.

After the discovery of the drug inside his bag, Bond confessed not once but twice. Both confessions were preceded by the administration of proper warnings concerning his constitutional rights. Bond has shown nothing to render his post-arrest statements inadmissible. Therefore, his motion to suppress both the methamphetamine and his post-arrest statements must be denied.

The case of Defendant Wiggs is a horse of a different color. The Court finds from the evidence that Wiggs was taken off the Greyhound bus and inside the Border Patrol office before the methamphetamine was discovered inside his backpack. Furthermore, the bus driver was cleared to leave the checkpoint, and the bus was driven away. At that point, Agent Cantu had effected a custodial arrest, which required probable cause. Compare **United States v. Bengivenga**, 845 F.2d 593 (5th Cir. 1988)(en banc), **cert. denied** 488 U.S. 924 (1988). However, Cantu did not possess probable cause to arrest Wiggs. With the departure of the bus, Defendant Wiggs was left stranded at a remote location, a million miles from nowhere, with no company other than his handcuffed friend and the polite but unsympathetic Border Patrolmen. Everything that followed,

including his alleged "consent" to the search of his backpack and the post-arrest statements he gave were the product of his illegal arrest. **Brown v. Illinois,** 422 U.S. 590 (1975); **Wong Sun v. United States,** 371 U.S. 471 (1963). Between the time of his arrest and the time of his last confession, there were no intervening events or circumstances which purged the primary taint. Therefore, the motion of Defendant Wiggs to suppress as evidence the methamphetamine found in his backpack and his post-arrest statements must be granted.

It is therefore ORDERED that the motion of Defendant Bond to suppress evidence in the above-styled and numbered cause be, and it is hereby, DENIED.

It is further ORDERED that the motion of Defendant Wiggs to suppress all fruits of the arrest, search and seizure at the Sierra Blanca checkpoint on July 17, 1997, including any post-arrest statements attributed to him, be, and it is hereby, GRANTED, and both the methamphetamine and his post-arrest statements be, and they are hereby, SUPPRESSED as evidence against him in his case.

SIGNED AND ENTERED this 23d day of October, 1997.

HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

APPENDIX C

District Court's Order Denying Motion for Reconsideration, November 13, 1997

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	§	
	§	
v.	§	No. EP-97-CR-682-H
	§	
STEVEN DEWAYNE BOND	§	

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

Defendant Steven Dewayne Bond previously filed a motion to suppress evidence in this case. Through his motion, Bond was seeking to suppress a quantity of methamphetamine and his confession. On October 23, 1997, the Court denied the motion to suppress evidence. Bond has now filed a motion for reconsideration of that order.

In his motion for reconsideration, the Defendant suggests that Border Patrol Agent Cantu violated his Fourth Amendment rights "by detaining the bus in which Defendant . . . was travelling, so that he could perform a suspicionless inspection of the travellers' overhead luggage in the bus?" (Motion to reconsider, page 1). Specifically, the Defendant states that he wants the Court to review "the scope of the official detention **before** Agent Cantu discovered the oval brick to determine whether it was reasonable under the Fourth Amendment . . .." (Motion to reconsider, page 3).

The undisputed evidence at the hearing on the motion to suppress evidence showed that a Greyhound Bus from El Paso arrived at the Sierra Blanca checkpoint at 7:55 p.m. on July 17, 1997. Border Patrol Agent Cantu got on the bus to check the citizenship or other status of its passengers. He started at the front of the bus and moved toward the back, questioning the passengers in each row of seats as he came to that row. When Agent Cantu reached the back of the bus, he looked in the bathroom, where some individual could have been hiding. He then turned around and headed for the front of the bus. As he did so, he looked in the luggage storage compartment located above the seats. As he came to the Defendant's row, something about a softsided green cloth bag in the overhead compartment attracted his attention. He touched the outside of the bag, and could feel a bricklike object. Thinking on the basis of his experience that this might be a package of drugs, he began asking questions of the nearby passengers. This led to the discovery of the fact that Defendant Bond was the owner of the bag and was transporting controlled substances.

This brief review of the evidence demonstrates the far-fetched nature of the Defendant's new contention. It is apparently the theory of the Defendant that when Border Patrol Agent Cantu reached the back of the bus, he was required by law to jump out the back window or to race to the front of the bus and jump out the door. He did neither, because he was required to do neither. Instead, after briefly questioning all the passengers and looking inside the bathroom, he began to work his way back to the front of the bus. In the course of doing so, he looked in the overhead luggage compartments.[1] Although this process may have delayed Agent Cantu's exit from the bus for a few seconds or even one or two minutes, the delay was trivial and inconsequential. It was certainly not

[1] The motion to reconsider states as a fact that the luggage compartments were incapable of concealing an undocumented alien. The Court does not recall the testimony that way. Although it might be considered improbable, it was not impossible for an alien to conceal himself or herself in the luggage compartments.

sufficient to convert this minimally intrusive detention of a bus at a fixed checkpoint into something forbidden by the Fourth Amendment. **See: United States v. Bengivenga**, 845 F.2d 593 (5th Cir. 1988)(en banc), **cert. denied** 488 U.S. 924 (1988). It is equally clear that the minimally intrusive touching of the exterior of a bag located in the luggage compartment was neither a search nor a seizure within the meaning of the Fourth Amendment. **United States v. Lovell**, 849 F.2d 910 (5th Cir. 1988); **United States v. Garcia**, 849 F.2d 917 (5th Cir. 1988).

It is therefore ORDERED that the motion of Defendant Bond to reconsider the order denying his motion to suppress evidence be, and it is hereby, DENIED.

SIGNED AND ENTERED this 13th day of November, 1997.

HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

No. 98-9349

In the Supreme Court of the United States

October Term, 1998

STEVEN DEWAYNE BOND, PETITIONER,

v.

UNITED STATES OF AMERICA

Supreme Court, U.S.
FILED
MAY 10 1999
OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

The undersigned, an attorney, a member of the Bar of this Court, certifies that pursuant to Rule 29.3, Supreme Court Rules, she served the within Motion for Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari on Counsel for the United States, and counsel for other parties required to be served, by enclosing a copy of each in an envelope, with first-class postage prepaid, addressed to their post office addresses:

The Honorable Seth P. Waxman
Solicitor General of the United States
U.S. Department of Justice
10th Street and Constitution Ave., NW, Room 5614
Washington, D.C. 20530
(202) 514-2201

and depositing same in a United States mailbox at San Antonio, Texas, on May 10, 1999. Counsel further certifies that all parties required to be served have been served.

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Assistant Federal Public Defender
Western District of Texas
727 E. Durango Blvd., B-207
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Counsel of Record for Petitioner

ORIGINAL

Supreme Court, U.S.
FILED
SEP 3 1999
CLERK

No. 98-9349

IN THE SUPREME COURT OF THE UNITED STATES

RESPONSE REQUESTED

STEVEN DEWAYNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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SUPREME COURT, U.S.

20 pp

QUESTIONS PRESENTED

1. Whether an officer's handling of the exterior of luggage sitting in an overhead baggage area of a passenger bus is a "search" of the luggage within the meaning of the Fourth Amendment.

2. Whether the bus on which petitioner was a passenger was unlawfully detained following inspection at an immigration checkpoint.

IN THE SUPREME COURT OF THE UNITED STATES

No. 98-9349

STEVEN DEWAYNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 167 F.3d 225. The orders of the district court denying petitioner's motion to suppress and his motion for reconsideration (Pet. App. B and C) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1999. The petition for a writ of certiorari was filed on May 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Western District of Texas, petitioner was convicted of possessing methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and of conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to 57 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. A.

1. On July 17, 1997, petitioner was a passenger on a Greyhound bus that was stopped at the permanent Border Patrol checkpoint at Sierra Blanca, Texas, which is located on Interstate 10 approximately 85 miles east of El Paso, Texas. Pet. App. B1; Tr. 3-4, 11, 25.[1] Border Patrol Agent Cesar Cantu boarded the bus and checked the immigration status of the passengers as he worked his way toward the rear. Pet. App. B1; Tr. 2, 5. By the time Agent Cantu reached the back of the bus, he was satisfied that all of the passengers were lawfully in the United States. Pet. App. B1; Tr. 5-6.

Because the bus had no rear door, Agent Cantu walked back toward the front of the bus to the exit. Pet. App. C1; Tr. 5-6. As he did so, he checked the luggage racks above the heads of the seated passengers, touching and squeezing the luggage as he passed. Pet. App. B1, C1; Tr. 5-6, 38.[2] Petitioner was seated about five

[1] "Tr." designates the transcript of the September 18, 1997, hearing on petitioner's motion to dismiss.

[2] As the court of appeals noted, the record is unclear as to whether the overhead luggage bins on this particular bus were of the open or closed type. Pet. App. A226; see Tr. 7.

rows from the back of the bus. Pet. App. B2; Tr. 59-60. When Agent Cantu squeezed a soft-sided green canvas bag in the luggage bin above petitioner's seat, he noticed that the bag contained a hard "brick-like" object that he suspected was narcotics. Pet. App. A226, B2, C2; Tr. 8-10. Agent Cantu then asked the passengers who owned the bag, and petitioner acknowledged that the bag was his. Pet. App. A226, B2, C2; Tr. 11-12. After a short conversation, petitioner consented to a search of the contents of the bag. Ibid. See also Pet. App. B4. Inside the bag, Agent Cantu discovered a "brick" of methamphetamine weighing 1.34 pounds. Pet. App. A226, B2-B3, C2; Tr. 12-13, 18. After petitioner was advised of his Miranda rights, see Miranda v. Arizona, 384 U.S. 436 (1966), he told Agent Cantu that he was delivering the methamphetamine from California to Little Rock, Arkansas. Pet. App. A226, B3; Tr. 20-22. Later that same day, petitioner made a second confession to another law enforcement officer. Pet. App. B3; Tr. 47-49.

2. Petitioner was indicted for possessing methamphetamine with intent to distribute it and conspiring to commit that offense, in violation of 21 U.S.C. 841(a)(1) and 846. The district court denied petitioner's pre-trial motion to suppress the fruits of the search of his luggage at the Sierra Blanca checkpoint. Pet. App. B. The district court found that, in the course of inspecting the bus passengers at the immigration checkpoint, as authorized by 8 U.S.C. 1357(a)(3), Agent Cantu was authorized to look in the

luggage compartments of the bus. Pet. App. B4.[3] The district court further found that no Fourth Amendment intrusion occurred when Agent Cantu "felt the outside of [petitioner's] softside green cloth bag." Pet. App. B4. "[I]t is well settled," the court explained, "that the minimally intrusive touching of the exterior of a bag located in the luggage area of a common carrier is neither a search nor a seizure within the meaning of the Fourth Amendment." Pet. App. B4 (citing United States v. Lovell, 849 F.2d 910 (5th Cir. 1988), and United States v. Garcia, 849 F.2d 917 (5th Cir. 1988)). Finally, the district court found that petitioner had voluntarily consented to Agent Cantu's search of the interior of the bag, and that there was no ground for suppressing his post-arrest admissions. Pet. App. B5.[4]

Petitioner sought reconsideration, arguing that Agent Cantu, by feeling the luggage as he walked back to the front of the bus, unnecessarily prolonged the time the bus was stopped, converting the checkpoint stop into an unlawful detention. The district court found that the luggage inspection did not result in a protracted detention of the passengers under the facts here. It explained:

---

[3] The district court later observed that "it would not have been impossible for an alien to conceal himself or herself in the luggage compartments." Pet. App. C2; see Tr. 81 (child could have been concealed); 11/24/97 Trial Tr. 4 (stipulation that "the overhead would have been large enough to accommodate a child").

[4] The district court did suppress evidence resulting from a separate search of the backpack of petitioner's traveling companion and co-defendant, Jason Wiggs. Pet. App. B5-B6. The district court found that Wiggs, unlike petitioner, had been arrested without probable cause before methamphetamine was found in Wiggs's luggage.

> When Agent Cantu reached the back of the bus, he looked in the bathroom, where some individual could have been hiding. He then turned around and headed for the front of the bus. As he did so, he looked in the luggage storage compartment located above the seats. As he came to [petitioner's] row, something about a softsided green cloth bag in the overhead compartment attracted his attention. He touched the outside of the bag, and could feel a bricklike object. Thinking on the basis of his experience that this might be a package of drugs, he began asking questions of the nearby passengers. This led to the discovery of the fact that [petitioner] was the owner of the bag and was transporting controlled substances.

Pet. App. C2. After Agent Cantu completed questioning the passengers at the rear of the bus regarding their immigration status, the district court observed, Agent Cantu was not required "to jump out the back window or to race to the front of the bus and jump out the door." Ibid. The district court added that, while the luggage inspection "may" have delayed Agent Cantu's departure from the bus at most "by a few seconds or even one or two minutes," that "trivial and inconsequential" delay did not give rise to a Fourth Amendment violation. Pet. App. C2-C3.

3. Following a bench trial on stipulated facts, petitioner was convicted on both counts on which he was charged. The court of appeals affirmed. Pet. App. A225-A228.

a. The court of appeals first rejected petitioner's claim that Agent Cantu, in touching the exterior of petitioner's luggage, had conducted a "search" within the meaning of the Fourth Amendment. Relying on the principle that "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection," Katz v. United States, 389 U.S. 347, 351 (1967), see Pet. App. A226-A227, the court of appeals concluded

that petitioner had knowingly exposed the exterior of his bag to touching and feeling by others. Petitioner had stored his bag in the overhead luggage bin in the common area of a Greyhound bus where, the court observed, it foreseeably would be squeezed, moved, and manipulated by others because "on common carriers, passengers often handle and manipulate other passengers' luggage while stowing or retrieving their own luggage." Id. at A227. Having knowingly exposed his bag to such public touching, the court continued, petitioner "did not have a reasonable expectation that his bag would not be handled or manipulated" as it had been by Agent Cantu in this case. Ibid. (citing United States v. McDonald, 100 F.3d 1320, 1327 (7th Cir. 1996), cert. denied, 520 U.S. 1258 (1997); United States v. Guzman, 75 F.3d 1090, 1095 (6th Cir.), cert. denied, 519 U.S. 906 (1996); United States v. Harvey, 961 F.2d 1361, 1364 (8th Cir.), cert. denied, 506 U.S. 883 (1992)).

The court of appeals also rejected petitioner's reliance on United States v. Nicholson, 144 F.3d 632, 639 (10th Cir. 1998). In that case, the Tenth Circuit had held that the law enforcement officer's manipulation of luggage stored in an overhead luggage bin constituted a search where the officer's manipulation was different from the sort of handling one might reasonably expect from a fellow passenger. See Pet. App. A227 (characterizing Nicholson). For Fourth Amendment purposes, the court of appeals held, it was irrelevant that Agent Cantu's manipulation of the exterior of petitioner's bag was calculated to detect contraband. Pet. App. A227 (citing California v. Ciraolo, 476 U.S. 207 (1986)).

b. The court of appeals also rejected petitioner's claim that Agent Cantu discovered the methamphetamine during an unlawful detention of the bus after the immigration inspection had been completed. Pet. App. A227-A228. The court of appeals noted that the bus had no rear exit and that Agent Cantu had inspected the luggage compartment while walking to the exit at the front of the bus. Id. at A227. Although the court of appeals recognized that the scope of the permissible inspection at a permanent immigration checkpoint is limited, see United States v. Martinez-Fuerte, 428 U.S. 543 (1976), it "[did] not read Martinez-Fuerte to mean that once Agent Cantu reached the back of the bus, he was required to jump out a window or sprint back to the front of the bus and jump out the door." Pet. App. A228. Pointing out that there was "no evidence that Agent Cantu's inspection of the overhead luggage compartment delayed the bus' departure more than an additional one or two minutes," the court concluded that "the trivial delay caused by Agent Cantu's inspection did not violate the strict limits of a border checkpoint stop." Pet. App. A228.

ARGUMENT

1. Petitioner contends (Pet. 5-11) that Agent Cantu, by touching and manipulating the exterior of his bag while walking toward the exit of the bus, conducted an unlawful "search" within the meaning of the Fourth Amendment. The courts of appeals, he further contends, are in conflict on whether handling the exterior of luggage sitting in the overhead luggage compartment of a bus or train constitutes a "search" within the meaning of the Fourth

Amendment. While there is disagreement in the courts of appeals about whether an inspection of the general type conducted here constitutes a Fourth Amendment search, it is not clear that, on the particular facts of this case, any other circuit would have reached a different result. Because the court of appeals correctly held that the brief handling of petitioner's bag in this case was not a search, further review is not warranted.

a. Government action constitutes a "search" within the meaning of the Fourth Amendment only if it infringes on an expectation of privacy that society considers to be objectively reasonable. California v. Greenwood, 486 U.S. 35, 39 (1988); United States v. Jacobsen, 466 U.S. 109, 113 (1984); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Agent Cantu's examination of the exterior of petitioner's bag did not violate such an expectation. It is undisputed that petitioner left his bag exposed in the overhead luggage compartment common to all passengers on the Greyhound bus. And it likewise is undisputed that, "on common carriers" like the bus, "passengers often handle and manipulate other passengers' luggage while stowing or retrieving their own luggage." Pet. App. A227. As a result, it was entirely "foreseeable" if not expected that petitioner's "bag would be squeezed, moved, and manipulated by others." Ibid. Accordingly, petitioner "did not have a reasonable expectation that" such "handl[ing] or manipulat[ion] by others" would not occur. Ibid.; see Katz, 389 U.S. at 351 ("What one knowingly

exposes to the public * * * is not a subject of Fourth Amendment protection.").

Agent Cantu's handling of the exterior of the luggage was, moreover, minimally intrusive. Like the "canine sniff" of luggage that this Court held not to be a Fourth Amendment search in United States v. Place, 462 U.S. 696 (1983), the agent's touching of the bag did "not require opening the luggage." Place, 462 U.S. at 707. Nor did it "expose noncontraband items that otherwise would remain hidden from public view." Ibid. To the contrary, by its nature, such touching of the exterior of the bag -- like the similar touching and handling of bags that might be expected from other passengers or carrier employees -- reveals only the general shape and density of objects inside a bag. See United States v. McDonald, 100 F.3d 1320, 1326 n.7 (7th Cir. 1996), cert. denied, 520 U.S. 1258 (1997).

For those reasons, officers may legitimately touch and handle the exterior of luggage placed in the overhead rack of a bus or train -- just as other passengers might while stowing, opening, or retrieving their own luggage -- without converting their observations into a "search" within the meaning of the Fourth Amendment. As the Seventh Circuit noted in United States v. McDonald, supra, a bus passenger does "not have a reasonable expectation of privacy that the exterior of" luggage placed in an overhead rack will "not be felt, handled, or manipulated by others." Id. at 1326. Any such expectation, that court explained, is inherently unreasonable given the likelihood that other

passengers, "in retrieving and stowing their own bags, * * * would have to move, touch, or push" the defendant's "bags, and would in all probability feel the outside of [the] bags in doing so." Ibid. Instead, a passenger who places his or her bags on an overhead rack "knowingly and voluntarily expose[s] the exterior of [the] bags to being physically touched by other persons." Ibid.

Similarly, in United States v. Guzman, 75 F.3d 1090, cert. denied, 519 U.S. 906 (1996), the Sixth Circuit found that it was not a search when an officer's "touch" of the exterior of a passenger's bag in the overhead luggage bin of a bus indicated the presence of "several hard bricks inside." Id. at 1095. While passengers have an expectation of privacy in the contents of their luggage, the Guzman court observed, that expectation does not extend to the exterior "feel" of luggage in overhead racks because such items are "accessible to others in the normal flow of traffic on the bus." Ibid.

b. Petitioner asserts that the holding below conflicts with the Tenth Circuit's decision in United States v. Nicholson, 144 F.3d 632 (1998). While there is tension between the holding in Nicholson and the holdings in McDonald, Guzman, and this case, the position of the Tenth Circuit on facts directly analogous to those in this case is unclear. Thus, although the question presented in this case may ultimately require resolution by this Court, such review is not warranted in this case.

The Tenth Circuit in Nicholson began by recognizing that an "officer's touching of a bag's exterior does not necessarily

constitute a search." Nicholson, 144 F.3d at 636 (noting uniform authority supporting that proposition). The Nicholson court further acknowledged that placing a bag in the overhead rack of a common carrier necessarily "exposes it to certain intrusions" because "[s]eeking to make room for their own articles, other passengers may push and move the bag." Id. at 639. "The degree of intrusion," the Tenth Circuit concluded, "is the determining factor as to whether an officer's contact with the exterior of luggage constitutes a search under the Fourth Amendment." Ibid.

In Nicholson itself, the Tenth Circuit held that the officer's handling of the bag did constitute a "search" under the Fourth Amendment because the officer had manipulated the bag in a particularly intrusive manner -- one that the defendant "did not reasonably expect from other passengers." 144 F.3d at 639. Specifically, the law enforcement officers there, with the permission of the bus company, entered the passenger area of a Greyhound bus, after the passengers had disembarked at a regularly scheduled stop en route from San Diego to New York City, and proceeded to remove the passengers' bags from the overhead racks so that they could be "manipulated and smelled." Id. at 634-635. Distinguishing its earlier decision in United States v. Gault, 92 F.3d 990 (10th Cir.), cert. denied, 519 U.S. 939 (1996) -- which held that an officer did not perform a "search" when he kicked and lifted a gym bag that had been on the floor of the train, protruding into the aisle -- the court of appeals in Nicholson observed that "the officer's manner of handling the bag" in Gault

"was the sort that a traveler leaving the bag in such a position reasonably might expect." Nicholson, 144 F.3d at 636-637 (explaining Gault). The same thing, the Tenth Circuit held in Nicholson, could not be said of what the court thought to be the more intrusive handling of bags in that case. Id. at 639.[5]

The ultimate reach of the Tenth Circuit's holding is unclear. The court of appeals did state that it "part[ed] company with the Seventh Circuit's conclusion in McDonald that a passenger on a commercial bus has no reasonable expectation that a carry-on bag in an overhead rack will not be 'manipulated by others.'" Nicholson, 144 F.3d at 639 (quoting McDonald, 100 F.3d at 1326). Similarly, in explaining why the intrusion before it constituted a "search," the court in Nicholson focused on the fact that the agent had "worked [Nicholson's] bag to determine whether it contained something of independent evidentiary value," and the court

[5] The Eighth Circuit, while it has considered Fourth Amendment challenges to similar luggage inspections, has not resolved the specific question presented here. In upholding an officer's removal of a bag from the overhead baggage compartment to the floor of a bus for a canine "sniff" of the luggage, the Eighth Circuit has stated that "[p]assengers have no objective, reasonable expectation that their baggage will never be moved once placed in an overhead compartment." United States v. Harvey, 961 F.2d 1361, 1364 (8th Cir.), cert. denied, 506 U.S. 883 (1992). A more recent decision, however, indicates that the issue is not settled in that Circuit if the officer, instead of moving the bag to the floor, feels the exterior of the bag. In United States v. Washington, 146 F.3d 536 (8th Cir. 1998), an officer noticed the defendant's bag in the overhead luggage compartment of a bus and felt bundles consistent with narcotics packaging when he "physically manipulated it, lifted it, and felt along its bottom." Id. at 537. The Eighth Circuit in Washington stated that it had "grave doubts" about the constitutional propriety of the officer's manipulation of the defendant's bag, but it did not find it necessary to resolve that question because the defendant in that case was found to have abandoned the bag. Id. at 537-538.

concluded that "manipulating a bag with the hands" is a search because it may reveal the contents of the interior of the bag and is "aimed at" doing so. Ibid. (internal quotation marks omitted). Both the Seventh Circuit in McDonald and the court of appeals in this case correctly rejected that reasoning, concluding instead that such manipulation of stowed luggage in the overhead compartment of a bus does not constitute a Fourth Amendment "search" so long as the officers' actions are objectively consistent with what a traveler might reasonably expect to occur as other passengers push and move bags to facilitate stowage or retrieval of their own. McDonald, 100 F.3d at 1326 ("[T]he feeling and pressing of McDonald's bags that the police officers undertook in the present case was nothing more than McDonald might expect from others, bus employees as well as passengers on the bus, moving luggage to adjust, remove, or make room for their baggage."); Pet App. A227 (noting that "[o]n common carriers, passengers often handle and manipulate other passengers' luggage while stowing or retrieving their own luggage," and disagreeing with the analysis of Nicholson because the officers' intention in manipulating the bag "is irrelevant for Fourth Amendment purposes").

The result in Nicholson may nevertheless turn on a factual distinction. In Nicholson, the court of appeals concluded that the agent "departed from the type of handling a commercial bus passenger would expect his baggage to be subjected [to]," where the agent "removed [Nicholson's] carry-on bag from the overhead rack

and conducted a 'tactile examination * * * .'" 144 F.3d at 639. The Nicholson court further noted that, in contrast to the facts before it, the baggage in McDonald was examined "without actually removing the bags from the racks." Id. at 635, 638. See also Pet. App. A226 (petitioner's baggage was squeezed while it remained in the overhead rack). And the Nicholson court added that "[n]otably, in McDonald, the [Seventh Circuit] thrice repeated that the officer did not remove defendant's bag from the overhead rack during his initial contact with it." Nicholson, 144 F.3d at 638 (citing McDonald, 100 F.3d at 1322, 1323 n.3, and 1326).

It is not obvious, as an analytical manner, why the removal of the bag before its manipulation should make a difference in the outcome. Passengers or bus operators may often have to remove stowed baggage in order to rearrange bags or to fit additional bags into a storage compartment. See United States v. Harvey, 961 F.3d at 1364. Moreover, the Tenth Circuit in Nicholson did not suggest that the agent's decision to remove the bag from the overhead rack rendered the manipulation in that case more thorough or intrusive than it otherwise would have been. At the same time, however, it remains to be seen whether the Tenth Circuit will conclude that a brief tactile inspection of baggage that remains in an overhead rack -- as in this case -- constitutes a "search." The uncertainty over whether the Tenth Circuit will apply Nicholson to those facts is reinforced by that court's observation that "[t]he degree of intrusion is the determining factor as to whether an officer's

contact with the exterior of luggage constitutes a search under the Fourth Amendment." 144 F.3d at 639.

Accordingly, although we disagree with the ultimate result in Nicholson, at present there does not appear to be a disagreement concerning the principles applicable to cases like this one; nor is there a square conflict in results. To the contrary, the courts of appeals generally agree that a law enforcement officer's manipulation of the exterior of luggage placed in common stowage areas or checked with a common carrier is permissible under the Fourth Amendment unless the manipulation is of a sort that society expects not to occur; i.e., wholly inconsistent with the way another passenger or the carrier's employees might handle the bag. See, e.g., United States v. Lovell, 849 F.2d 910, 913 (5th Cir. 1988). And while the application of that broad principle to various methods of examination may yield different results in different contexts, those applications have not as yet yielded a square conflict requiring this Court's review.

2. Petitioner also contends that the inspection of his bag occurred during an unlawful detention of the bus and its passengers. Pet. 11-13. In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), this Court upheld brief vehicle stops by the Border Patrol at fixed checkpoints at which officers may question the occupants about their immigration status and request the production of a document evidencing a right to be in the United States. Id. at 558, 566-567. The Court cautioned, however, that "any further detention * * * must be based on consent or probable

cause." Id. at 567 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975)).

Relying on that language, petitioner argues that the bus was unlawfully detained for additional time because Agent Cantu, as he walked to the exit at the front of the bus, paused to touch petitioner's bag, even though he had already concluded that all the passengers on the bus were lawfully in the United States. Pet. 11-13. That fact-specific claim was properly rejected by both courts below. See Pet. App. A227-A228, C2-C3. Agent Cantu's inspection of the luggage occurred as he walked toward the exit at the front of the bus -- there was no rear exit -- after having checked the immigration status of the passengers. Pet. App. A227; Pet. App. C2. There was no evidence that Agent Cantu's touching of the bags as he walked through the bus caused a delay of any consequence. Id. at A228.[6] Nor is it reasonable to read Martinez-Fuerte as prohibiting an officer from proceeding toward the exit at the front of the bus at a reasonable pace. As the courts below observed, Martinez-Fuerte surely does not require agents like Agent Cantu "to jump out a window or sprint back to the front of the bus and jump out the door" the moment they conclude that the bus's occupants are in the United States legally. Pet App. A228; see id. at C2 (similar statement).[7]

---

[6] That conclusion is further supported by the fact that petitioner was seated very near the rear of the bus, so any delay prior to reaching petitioner's bag would have been minimal. See Tr. 80.

[7] Although petitioner argues that the detention in this case "was not brief," Pet. 13, he does not cite anything in the record to undermine the district court's contrary conclusion that any delay lasted only "a few seconds" or "one or two minutes." See Pet. App. C2; see also Pet. App. A228 (court of appeals' holding that there was no evidence that luggage inspection delayed the bus' departure more than one or two minutes). That factual determination, concurred in by both courts below, does not warrant review by this Court. Petitioner also suggests (Pet. 13) that, as part of his inspection, Agent Cantu manipulated luggage under passengers' seats and had passengers move so that he could reach luggage under the seats. That assertion is apparently based on testimony that the district court did not adopt (or explicitly reject). Instead, the district court found that that "[o]n his way back to the front of the bus, Agent Cantu checked the luggage racks above the heads of the seated passengers." Pet. App. B1-B2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1999

IN THE SUPREME COURT OF THE UNITED STATES

BOND, STEVEN DEWAYNE Petitioner	)	
vs.	)	No. 98-9349
USA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 3rd day of September 1999.

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No. 98-9349

In the Supreme Court of the United States

October Term, 1998

STEVEN DEWAYNE BOND, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES OF AMERICA IN OPPOSITION

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Rule

Supreme Court Rule 15.6 1

Pursuant to Supreme Court Rule 15.6, Petitioner Steven DeWayne Bond files this Reply to the Brief for the United States of America in Opposition to his petition for writ of certiorari.

INTRODUCTION

Petitioner Bond, an interstate traveler on a Greyhound bus, was convicted for possessing methamphetamine that was found in his carry-on luggage after a law enforcement officer squeezed and felt the luggage to determine its contents. Bond appealed his conviction, contending that the officer's manipulation of his personal carry-on luggage was an unlawful search. The Fifth Circuit held that the officer's manipulation of Bond's bag was not a search for Fourth Amendment purposes. Bond now petitions the Court to grant certiorari and resolve the Fourth Amendment issue that has divided the circuits. Conceding that there is general disagreement among the circuits, the Government nonetheless opposes Bond's petition. Among other things, the Government contends that review by this Court is not appropriate since the manipulation of luggage in a manner calculated to determine its contents is like the canine sniff that this Court approved in *United States v. Place,* 462 U.S. 696 (1983).

The Government also opposes Bond's request for certiorari on another issue: whether the strict constitutional limits on immigration checkpoint stops are violated by the continued detention of passengers so that their luggage may be manipulated to inspect for drugs. Bond replies briefly to the Government's arguments.

ARGUMENTS

I. THE COURTS OF APPEALS SPECIFICALLY DISAGREE AS TO WHETHER A SEARCH OCCURS WHEN A LAW ENFORCEMENT OFFICER MANIPULATES LUGGAGE IN A MANNER CALCULATED TO REVEAL ITS CONTENTS.

The Government incorrectly characterizes the circuit conflict as a disagreement about "whether handling the exterior of luggage" is a search under the Fourth Amendment. Gov't Br. 7. Based on that characterization, it concedes that "there is disagreement . . . whether an inspection of the general type conducted here constitutes a Fourth Amendment search." Gov't Br. 8. The Government is correct that there is a division among the circuits; its characterization of that division is wrong.

The disagreement among the courts of appeals is not general and it does not involve the simple handling of the exterior of luggage. The disagreement is specific, clear, and direct: The courts are in conflict as to whether a law officer's manipulation of luggage in a manner calculated to determine its contents is a search under the Fourth Amendment. See *United States v. Bond,* 167 F.3d 225, 226–27 (5th Cir. 1999) (manipulation of luggage calculated to detect contraband is not a search); *United States v. Nicholson,* 144 F.3d 632, 639 (10th Cir. 1998) (manipulation of bag to determine if it contained item of evidentiary value is a search); *United States v. McDonald,* 100 F.3d 1320, 1326–27 (7th Cir. 1996) (manipulation of bag to find drugs is not a search); *see also United States v. Washington,* 146 F.3d 536, 537 (8th Cir. 1998) (court has "grave doubts" whether purposeful luggage

manipulation constitutional); *cf. United States v. Most,* 876 F.2d 191, 193, 195 (D.C. Cir. 1989) ("crush technique" to feel bag is search).[1]

The specific issue that *Bond, Nicholson,* and *McDonald* all have in common, and the issue upon which they disagree, is whether a tactile inspection of luggage that is calculated to detect drugs constitutes a search. The Government agrees with the Fifth Circuit that a law enforcement officer's purpose in searching—to feel for drugs—is irrelevant for Fourth Amendment purposes. Gov't Br. 13. Of course, the subjective purpose of law enforcement officers is not determinative of whether a Fourth Amendment search has occurred. *See California v. Ciraolo,* 476 U.S. 207, 213–14 & n.2 (1986) (officers' purpose to look for marijuana irrelevant).

It is not the officer's purpose that is important. Rather, it is the type of manipulation necessary to achieve that purpose that violates the Fourth Amendment. Disagreement about that type of manipulation is what has divided the courts of appeals. An officer whose purpose is to detect drugs packed away in luggage physically manipulates that luggage in a manner that reveals its contents. Objectively, that type of manipulation—the type of manipulation involved in *Bond, Nicholson,* and *McDonald*—is not what any traveler reasonably expects personal hand luggage will be subjected to, either by other travelers, or by law enforcement officers.

---

1. The "grave doubts" of the Eighth Circuit were recently echoed by dissenting Judge Bogue in *United States v. Liu,* 180 F.3d 957, 964 (8th Cir. 1999). Judge Bogue criticized the majority's finding that Liu lacked standing as a "detour around the challenged search." *Id.* The judge would have reached the search issue and concluded that a the law officer's manipulation of luggage was a search. *Id.* at 964 (citing *Nicholson* and *Most*).

Bond's case illustrates the type of manipulation that invades a reasonable expectation of privacy in luggage. Border Patrol Agent Cesar Cantu admitted that he squeezed Bond's carry-on luggage, and that he squeezed it "very hard." (Tr. 9, 30.)[2] His manipulation permitted the officer to feel "a brick-like object" with "an outline of something of different mass inside of it." (Tr. 9.) Although the brick of methamphetamine in Bond's luggage was wrapped in tape, and then wrapped again in a pair of pants, the officer's tactile inspection was probing enough to reveal the "edges of the brick," a brick that was "hard." (Tr. 10.)

Like the tactile inspections in *Nicholson* and *McDonald,* the officer's "manipulation of Bond's bag was calculated to detect contraband." *Bond,* 167 F.3d at 227. Agent Cantu, seeking to determine whether Bond's luggage contained drugs, squeezed the bag in a manner that revealed its contents. Other passengers do not squeeze luggage in that manner. They may push or pull luggage to make room for their own; the luggage may be squeezed against other luggage in those efforts; but fellow passengers do not squeeze luggage with their hands or manipulate it in a manner that reveals its contents.

As the Tenth Circuit held in *Nicholson,* that type of probing manipulation invades an expectation of privacy that society accepts as reasonable: "By manipulating [Nicholson's] bag in a manner [he] did not reasonably expect from other passengers, Detective Leach conducted a search." 144 F.3d at 639. The *Nicholson* court's recognition of the critical difference

2. References are to pages of the transcript of the hearing on Bond's suppression motion.

between an officer's probing manipulation and bus passengers' casual touching, pushing, or moving of luggage, is what led it to "part company with the Seventh Circuit's" decision in *McDonald*. *Nicholson, id.* (citing *McDonald,* 100 F.3d at 1326)). The same disagreement led the Fifth Circuit in this case to reject the Tenth Circuit's reasoning in *Nicholson*. *Bond,* 167 F.3d at 227 (citing *Nicholson,* 144 F.3d at 639)).[3]

The Government's meticulous parsing of the facts of Bond's case fails to obscure this real and direct conflict among the courts of appeals. Gov't Br. 8–15. For example, there is no determinative significance to the fact that the officer in *Nicholson,* unlike the officer in *Bond,* removed luggage from the overhead rack before he manipulated it. Although the Government suggests *Nicholson*'s result may have turned on this factual distinction, the Government admits that, "[i]t is not obvious, as an analytical matter, why the removal of the bag before its manipulation should make a difference in the outcome." Gov't Br. 13–14.

Similarly, the Government's attempt to compare the facts of Bond's case to other luggage cases does not change the nature of the fundamental and specific disagreement between the courts of appeals. Before the Seventh Circuit's decision in *McDonald,* various courts of appeals had ruled that minimal touching of the exterior of luggage was not a search. For example,

3. This basic disagreement was at the heart of Seventh Circuit Judge Ripple's dissent in *McDonald*. Judge Ripple pointed out that the officer's manipulation of luggage was "a tactile inspection by an expert examiner aimed at discovering the nature of the contents of the bag." 100 F.3d at 1333. Such an examination is "hardly the sort of occasional touching that a person expects his hand luggage to endure in an overhead rack." *Id.*

no search occurred where an officer merely "placed his hand on" a bag and asked to whom it belonged. *United States v. Guzman,* 75 F.3d 1090, 1092 (6th Cir. 1996).[4] No search occurred where an officer kicked and lifted a bag that was protruding into the aisle of a bus. *United States v. Gault,* 92 F.3d 990, 992-93 (10th Cir. 1996).[5] And, no search occurred where a bag checked with an airline had its sides compressed by an officer to release air so that he could smell for drug odor. *United States v. Lovell,* 849 F.2d 910, 911 (5th Cir. 1988).[6]

The Seventh Circuit's decision in *McDonald* was a giant leap beyond these cases; it was "a milestone in the unfolding of . . . Fourth Amendment jurisprudence." *McDonald,* 100 F.3d at 1333 (Ripple, J., dissenting). As Judge Ripple observed, before *McDonald,* "[n]o American court [had] allowed the police, acting without any suspicion, any permission, or any exigent circumstances, to intrude deliberately into the privacy of the interior of a person's luggage." *Id.* at n.16. *McDonald* gave law officers who lacked probable cause, or even reasonable suspicion, license to walk through public buses and trains and randomly manipulate hand-carried luggage to determine its contents. 100 F.3d at 1333. In *Nicholson,* the Tenth Circuit rejected *McDonald*'s holding. 144 F.3d at 639. In *Bond,* the Fifth Circuit embraced it. 167 F.3d at 227. This Court should grant certiorari to resolve this clear, direct, and specific disagreement among the courts of appeals.

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4. Relied upon by the Government at page 10 of its brief.

5. Relied upon by the Government at pages 11-12 of its brief.

6. Relied upon by the Government at page 15 of its brief.

II. THE GOVERNMENT'S ARGUMENT THAT MANIPULATION OF LUGGAGE IS LIKE A CANINE SNIFF, DEMONSTRATES THE NEED FOR GUIDANCE FROM THIS COURT ON AN IMPORTANT FOURTH AMENDMENT ISSUE.

The Government contends that the officer's manipulation of Bond's bag to discover its contents was minimally intrusive, "[l]ike the 'canine sniff' of luggage that this Court held not to be a search in *United States v. Place,* 462 U.S. 696 (1983)[.]" Gov't Br. 9. This Court's implicit approval of a canine sniff has now been expanded to justify a law enforcement officer's physical manipulation of luggage to determine its contents. Gov't Br. 9; *see McDonald,* 100 F.3d at 1325 n.7 (citing *Place*).

The sniff in *Place* "disclose[d] only the presence or absence of narcotics, a contraband item." 462 U.S. at 707. "[N]o other investigative procedure . . . is so limited in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Id.* It is a far cry from the "*sui generis*" canine sniff in *Place*[7] to the intrusive and revealing manipulation of luggage that occurred in this case, and that occurs whenever an officer squeezes and feels luggage to determine its contents.

The manipulation described by Agent Cantu, and acknowledged by the Fifth Circuit to be a method "calculated to detect contraband," *Bond,* 167 F.3d at 227, was readily capable of revealing more than just drugs. It could have revealed the presence of a videotape, eye glasses, medicine containers, personal hygiene items, or a myriad of private objects carried in personal hand luggage. Indeed, fragile items could be damaged, containers breached,

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7. 462 U.S. at 707.

or contents spoiled, by the type of hard squeezing and manipulation that Agent Cantu used to discover the contents of Bond's luggage. Such manipulation is not like a canine sniff.

Neither *Place* nor any other precedent of this Court has approved the suspicionless manipulation of luggage to determine whether it contains drugs. Yet, this intrusive "inspection" method is employed by law enforcement officers around the country.[8] Because of these inspections' broad impact, and the importance of this Fourth Amendment issue, this Court should grant certiorari to provide guidance to the courts of appeals.

III. The Issue Whether the Fourth Amendment Forbids the Suspicionless Detention of Bus Passengers So That Their Luggage May Be Manipulated to Inspect for Drugs Is Not "Fact Specific."

The Government argues that the Fifth Circuit "properly rejected" Bond's "fact-specific claim" that he was unlawfully detained so that a Border Patrol agent could manipulate his luggage in search of drugs. Gov't Br. 16. While the facts of Bond's case demonstrate a Fourth Amendment violation, his argument is not "fact-specific." Moreover, it was not properly rejected.

The Border Patrol's routine procedure, employed in Bond's case, shows that interstate bus travelers at the Sierra Blanca, Texas, immigration checkpoint are regularly and unlawfully detained to permit suspicionless luggage "inspections" for drugs after the immigration check is complete.

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8. In unpublished opinions, the Fifth Circuit decided two cases in 1993 that involved luggage manipulation. *See Bond*, 167 F.3d at 227 n.2. The published opinions in *Bond*, *McDonald*, *Washington*, and *Liu*, show that the manipulation of luggage is employed in the Fifth, Seventh, and Eighth Circuits. It was employed in the Tenth Circuit until *Nicholson*.

Agent Cantu testified that "we conduct an inspection of the overhead luggage by squeezing the bags as we're going out." (Tr. 6.) On cross-examination, Cantu elaborated that he also looked under seats for luggage, and that he "sometimes" had to ask passengers to move. (Tr. 31–32.)[9]

Agent Cantu also admitted that the luggage inspection in Bond's case was "the way" he "usually" carried out commercial bus inspections: after reaching the back of the bus, Cantu would conduct a "nonimmigration inspection" by squeezing bags as he "work[ed] [his] way up" to the front. (Tr. 30.) As set forth in Bond's petition, the Fourth Amendment issue posed by his unlawful detention has broad importance; it is not fact specific.

The Government's argument that the Fifth Circuit's ruling was correct hinges on two points: (1) Cantu's luggage inspection did not cause "a delay of any consequence," and (2) *Martinez-Fuerte* does not prohibit an officer "from proceeding toward the exit at the front of the bus at a reasonable pace." Gov't Br. 16.[10] The delay was of "consequence" because of what the officer did while he delayed the bus's departure: he manipulated luggage to detect drugs in violation of the Fourth Amendment's strict limits on immigration checkpoint stops, as set forth in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). Bond Pet. 11–13.

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9. The Government seemingly questions these facts by noting that information about luggage under the seats is "apparently based on testimony that the district court did not adopt (or explicitly reject)." Gov't Br. 17 n.7. The district court did not repeat all of Agent Cantu's factual assertions in its findings. Nonetheless, Agent Cantu testified, without contradiction, that he looked under seats for luggage and sometimes had to ask passengers to move. (Tr. 31–32.)

10. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

Of course, *Martinez-Fuerte* does not dictate the speed of a Border Patrol agent's exit from a bus. However, it is disingenuous for the Government to characterize Agent Cantu's luggage inspection as simply an exit conducted "at a reasonable pace." Gov't Br. 16. After stopping a busload of approximately 45 people for a strictly-limited immigration check, the Border Patrol agent extended the passengers' detention so that he could manipulate their luggage in search of illegal drugs. (Tr. 5–6, 8–9, 25, 39, 42, 67.) This abuse of the limited Fourth Amendment exception created by *Martinez-Fuerte* should be addressed by this Court.

CONCLUSION

FOR THESE REASONS, and for the reasons set out in Bond's petition, the Court should grant certiorari and review the questions presented in this case.

Respectfully submitted.

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No. 98-9349

In the Supreme Court of the United States

October Term, 1998

STEVEN DEWAYNE BOND,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

The undersigned, an attorney, a member of the Bar of this Court, certifies that pursuant to Rule 29.3, Supreme Court Rules, she served the Reply to the Brief for the United States of America in Opposition on the Counsel for Respondent by enclosing one copy in an envelope, with first-class postage prepaid, addressed to counsel of record at his post office address:

The Honorable Seth P. Waxman
Solicitor General of the United States
U.S. Department of Justice
10th Street and Constitution Avenue, NW, Room 5614
Washington, D.C. 20530
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SUPREME COURT, U.S.

and depositing same in a United States mailbox at San Antonio, Texas, on September 14, 1999; and further certifies that all parties required to be served have been served.

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September 14, 1999

Mr. William K. Suter
Clerk, Supreme Court
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1 First Street, NE
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FEDERAL EXPRESS NO: 811303296671

Re: **Steven DeWayne Bond**
v. United States of America
Cause No. 98-9349

Dear Mr. Suter:

I have enclosed for filing an original and ten copies of the Petitioner's Reply to the Brief of the United States of America in Opposition in this cause.

I have mailed a copy of this letter and a copy of the reply to the Honorable Seth P. Waxman, Solicitor General of the United States (Attn: William D. Brown), Department of Justice, 10th Street and Constitution Avenue, NW, Room 5614, Washington, D.C. 20530; and to Joseph H. Gay Jr., Assistant United States Attorney, Western District of Texas, 601 N.W. Loop 410, Suite 600, San Antonio, Texas 78216.

Thank you for your attention to this matter.

Very truly yours,

LUCIEN B. CAMPBELL
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Enclosure
cc: Mr. William C. Brown
Mr. Joseph H. Gay Jr.
Mr. Steven DeWayne Bond

(5)

No. 98-9349

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IN THE

Supreme Court of the United States

STEVEN DEWAYNE BOND,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 10, 1999
CERTIORARI GRANTED OCTOBER 12, 1999

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
(El Paso)

Criminal Docket for Case #: 97-CR-682-1

UNITED STATES OF AMERICA

v.

STEVEN DEWAYNE BOND

RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS
7/17/97	—	Arrest of Steven DeWayne Bond, Jason Michael Wiggs [3:97-m -1550] (rv) [Entry date 07//31/97]
8/6/97	9	Indictment filed against Steven DeWayne Bond, Jason Michael Wiggs Steven DeWayne Bond (1) count(s) 1, 2, Jason Michael Wiggs (2) count(s) 1, 2) (mml) [Entry date 08/07/97]
9/2/97	13	Motion by Steven DeWaye Bond with memorandum in support to suppress evidence (mml) [Entry date 09/03/97]
9/4/97	14	Response by USA to motion by Steven DeWayne Bond, Jason Michael Wiggs: motion to suppress evidence [13-1], motion to suppress evidence [11-1] (mml) [Entry date 09/05/97]
9/18/97	—	Motion hearing for Steven DeWayne Bond, Jason Michael Wiggs held for the following motions: [13-1], [11-1] (mml) [Entry date 09/22/97]

DATE		PROCEEDINGS
9/29/97	16	Supplemental Memorandum by Steven DeWayne Bond in support of motion to suppress evidence [13-1] as to Steven DeWayne Bond (mml) [Entry date 09/30/97]
10/8/97	17	Response brief by USA to motion by Steven DeWayne Bond, Jason Michael Wiggs: motion to suppress evidence [13-1], motion to suppress evidence [11-1] (mml) [Entry date 10/09/97]
10/23/97	18	Order as to Steven DeWayne Bond, Jason Michael Wiggs denying motion to suppress evidence [13-1] as to Steven DeWayne Bond (1), granting motion to suppress evidence [11-1] as to Jason Michael Wiggs (2) (mml) [Entry date 10/23/97]
10/31/97	19	Motion by Steven DeWayne Bond with memorandum in support for reconsideration of motion to suppress (mml) [Entry date 11/03/97]
11/13/97	21	Order as to Steven DeWayne Bond denying motion for reconsideration of motion to suppress [19-1] as to Steven DeWayne Bond (1) (mml) [Entry date 11/14/97]
11/19/97	22	Waiver of jury trial by Steven DeWayne Bond (mml) [Entry date 11/20/97]
11/24/97	—	Bench trial for Steven DeWayne Bond (1) count(s) 1, 2 held (mml) [Entry date 11/25/97]
11/24/97	—	Court verdict as to Steven DeWayne Bond guilty Steven DeWayne Bond (1) count(s) 1, 2 (mml) [Entry date 11/25/97]
1/8/98	—	Sentencing Steven DeWayne Bond (1) count(s) 1, 2 held Steven DeWayne Bond (1) count(s) 1, 2. 57 mos. impr. and assessment of $200.00. 3 yrs. supervised release. Sentence imposed in count 2 to be served concurrecently with that imposed in count 1. ; Mooted Motions: (mml) [Entry date 01/16/98]
1/16/98	26	Judgment and Commitment as to Steven DeWayne Bond (1) count(s) 1, 2) (mml) [Entry date 01/16/98]
1/21/98	—	Notice of appeal and certified copy of docket to USCA: as to Steven DeWayne Bond appeal [27-1] (mml) [Entry date 01/21/98]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50074

UNITED STATES OF AMERICA

v.

STEVEN DEWAYNE BOND

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
1/23/98		Direct criminal case docket. NOA filed by Appellant Steven Dewayne Bond. [98-50074] (jca)
7/10/98		Appellant's Brief filed by Appellant Steven Dewayne Bond. Copies of brief: 7 # of pages: 22. Date of COS: 7/8/98 Sufficient [Y/N]: Y. [98-50074] A/Pet's Brief ddl satisfied. E/Res's Brief due on 8/10/98 for USA. (sep)
7/10/98		Record excerpts filed by Appellant Steven Dewayne Bond # of copies: 4 Sufficient [Y/N]: Y. [98-50074] (sep)
8/12/98		Appellee's Brief filed by Appellee USA. Copies of Brief: 7 # of pages: 24. Date of COS: 8/10/98 Sufficient [Y/N]: y. [98-50074] E/Res's Brief ddl satisfied. Reply Brief due on 8/26/98 for Steven Dewayne Bond. (trm)
9/4/98		Reply brief filed by Appellant Steven Dewayne Bond. Copies of Brief: 7 # of pages: 22. Word count: 4779 Date of COS: 9/2/98 Sufficient [Y/N] : y. . [98-50074] Reply Brief ddl satisfied. (trm)

DATE	NO.	PROCEEDINGS
1/6/99		Oral arguument heard. Case argued by M Carolyn Fuentes for Appellant Steven Dewayne Bond, Margaret Feuille Leachman for Appellee USA [98-50074] (vlb)
2/8/99		Opinion filed. Issd in T form? Y Issue Mandate due on 3/1/99. [98-50074] (rmf)
2/8/99		Judgment entered and filed. [98-50074] (rmf)
10/18/99		Supreme Court order received granting petition certiorari [1298941-1] by Appellant Steven Dewayne Bond on 10/12/99. [98-50074] (rff)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

No. EP-97-CR-682-H

UNITED STATES OF AMERICA

v.

STEVEN DEWAYNE BOND

TRANSCRIPT OF MOTION TO SUPPRESS HEARING OF SEPTEMBER 18, 1997

[Excerpts from Testimony of Agent Cesar Cantu, Jr.]

* * * *

[2] DIRECT EXAMINATION

BY MR. NICHOLS:

Q. State your name, please.
A. My name is Cesar Cantu, Jr.
Q. How are you employed?
A. I'm employed by the United States Border Patrol.
[3] Q. Were you working as a Border Patrol agent on July 17, 1997 at the Sierra Blanca checkpoint?
A. Yes, sir, I was.
Q. What were your duties that day, sir?
A. To conduct checkpoint operations at the established checkpoint.
Q. What do those duties include?
A. Those duties include checking all eastbound traffic coming in through the checkpoint.

Q. Did the traffic coming from the west on July 17th, 1997, entering the checkpoint include a Greyhound bus?
A. Yes, sir, it did.
Q. Where did the bus come from?
A. El Paso, Texas.
Q. Are buses routinely inspected when they enter the Sierra Blanca checkpoint?
A. Yes, sir, they are.
Q. What does Border Patrol do with the buses, they inspect them right there as they enter the checkpoint or put them somewhere else?
A. As traffic is coming off I-10, there is cones established to separate a primary lane and a secondary lane. The primary lane, there is a break in the cones, and all buses automatically take that lane off to the right, and pull off into the secondary area where we can board the buses.
[4] Q. Is there a reason why the buses are pulled over to that point in the checkpoint?
A. Yes, sir, to conduct an immigration inspection of the passengers on the bus.
Q. And is there a traffic reason that you take the buses out of the lane and put them there?
A. Yes, sir, being that the bus has a lot of passengers, it would be kind of difficult to hinder traffic if we check it at primary.
Q. Approximately what time on July 17th did the Greyhound bus enter the Sierra Blanca checkpoint?
A. 7:55 p.m., more or less.
Q. I'm sorry. I didn't hear your answer.
A. 7:55 p.m., more or less.
Q. Did you personally conduct an immigration check of the people on the bus?
A. Yes, sir, I did.

Q. Was this done in accordance with the routine you've described, the bus being pulled over to the secondary side?

A. Correct, sir.

Q. Who boarded the bus on that day in order to conduct immigration checks?

A. I did, sir.

Q. Did you have any help or were you alone?

A. I was alone.

[5] Q. Would you tell the judge what you did, please, when you got on the bus?

A. As soon as I boarded the bus, I commenced the immigration inspection of all the passengers on the bus. I worked my way towards the rear of the bus, and once I had completed the immigration inspection, as I was exiting the bus, I conducted an inspection of the overhead luggage on the bus.

Q. Now, we're going to go into details of that in a moment, but let me ask you this. Would it not be possible also just to ask everybody to get off the bus and conduct the immigration check in the checkpoint?

A. Could it be possible?

Q. Couldn't you do that?

A. We prefer not to do that. But, yeah, we could.

Q. Why do you prefer not to do that?

A. Because of the safety of the passengers on the bus, crossing the primary inspection area there. It would be more time consuming for them.

Q. Is it also more convenient for the passengers to stay on the bus?

A. Yes, sir.

Q. Are immigration checks conducted in all kinds of weather at that checkpoint?

A. Correct, sir.

[6] Q. Okay. Let's talk about the particular checks that you did. When you ran the immigration checks of the Greyhound bus on July 17th, 1997, by the time you made your way to the back of the bus, were you satisfied that everyone was lawfully in the United States that was on that bus?

A. Correct.

Q. What did you do on the way out? Was there a door on the back of the bus?

A. No, sir.

Q. Did you have to go out the same door you came in?

A. Correct.

Q. What did you do along your route of retreat, as it were, toward the front of the bus?

A. As we're working our way towards the front of the bus, we conduct an inspection of the overhead luggage by squeezing the bags as we're going out.

Q. Are these closed compartments like on an airliner, or are they open?

A. There are some that are closed and some that are open.

Q. What kind of overhead luggage compartments were on this bus?

A. I don't recall, sir.

Q. Okay. So as you made your way to the front, did you see—

THE COURT: Hold up there just a minute. I don't [7] understand that answer. You don't remember whether it was a closed compartment or whether it was just open?

THE WITNESS: Correct, sir.

THE COURT: If it were a closed compartment, do you require that all of them be opened so you can go along feeling of bags?

THE WITNESS: If they are closed, yes, sir.

THE COURT: Who does that?
THE WITNESS: I do that.
THE COURT: You open them yourself?
THE WITNESS: Right.
THE COURT: You don't recall if you did that this day?
THE WITNESS: No, sir, I don't.
THE COURT: Go ahead.
Q. Compared with a man of average height, standing, where would the—how high would the luggage bins be?
A. Oh, about five and a half feet.
Q. Okay. Are you a person of average build?
A. I consider myself, yes, sir.
Q. Where did the luggage bins come to on you when you're standing in the bus?
A. About eye level.
Q. Okay. On your way out did you notice anything unusual or interesting to you in the luggage bin?
[8] A. As I was working my way out, I felt a green bag that I could feel a brick-like object in it.
Q. You were feeling bags on your way out, sir?
A. Correct.
Q. Were you opening the bags?
A. No, sir.
Q. Who was seated underneath the green bag that you've just described, if you remember?
A. The subjects Bond and Wiggs.
Q. Were they seated together?
A. Correct.
Q. Do you see them in court today?
A. Yes, I do.
Q. Would you point them out, please, and identify each?
A. They are the gentlemen with the black T-shirts, blond, and the man with the short hair and the scar on his head.

Q. Do you remember which is which?
A. Yes, sir, Bond is the gentleman with the light brown hair and the other one is Mr. Wiggs.
Q. And what does Mr. Wiggs look like?
A. Mr. Wiggs has a scar over his forehead.
MR. NICHOLS: Your Honor, may the record reflect the witness has identified the defendants?
THE COURT: I can't even see them, so I have no idea.
[9] MR. STANTON: Stand up.
THE COURT: Is that Mr. Wiggs?
THE WITNESS: Correct, sir.
MR. NICHOLS: May the record so reflect, your Honor?
THE COURT: Yes.
MR. NICHOLS: Thank you.
Q. When you felt the green bag over Mr. Bond and Mr. Wiggs, did you seem to feel anything in it?
A. Yes, sir, I did.
Q. What did you feel?
A. Brick-like object in it that, when squeezed, you could feel an outline of something of different mass inside of it.
Q. As a Border Patrol agent are you expected to look for contraband, drugs, if you find them?
A. Yes, sir, we are.
Q. Have you in your training and experience been aware of any passengers on buses carrying drugs in the overhead?
A. Yes, sir, numerous times.
Q. Have you personally conducted seizures of contraband from the overheads in buses entering the checkpoint?
A. Yes, sir, I have.
Q. The Sierra Blanca checkpoint?
A. Correct, sir.

Q. Have those occurred on few or many occasions?

[10] A. It's been many occasions.

Q. What was there—first of all, would you describe the bag in detail that you saw.

A. It was a green canvas bag, about maybe a foot and a half long by a foot tall, about a foot width.

THE COURT: I can't hear what you're saying. Would you speak up a little bit.

THE WITNESS: About a foot and a half long, a foot in height and a foot in width, more or less.

Q. What was there about the object that you felt that caused you to be interested in it.

A. The object, its shape is what caught my attention, since we do find a lot of narcotics, and they're usually wrapped in brick-shaped objects. That's how they're concealed.

Q. Would you describe in detail what you felt, please, in terms of how it felt and its dimensions?

A. I don't recall the dimensions of the brick itself, but when I felt it I could feel the edges of the brick in the bag.

Q. Okay. What did it feel like? Was it soft, was it hard, was it something in between?

A. It was hard, sir.

Q. Have you made narcotics seizures of bricks previously that were similar to this?

A. Correct, sir.

[11] Q. When you felt the brick-like object in the bag, what did you think it might be?

A. Contraband.

Q. What did you do?

THE COURT: Wait a minute. What do you mean by contraband?

THE WITNESS: Well, narcotics, sir.

THE COURT: You don't mean jewelry or firearms or anything like that?

THE WITNESS: No, sir.

THE COURT: Say what you mean. It will speed things up a lot if you will just answer the question directly. Go ahead.

Q. Once you thought it might be narcotics, what did you do?

A. I questioned the passengers of the bus as to whom the bag belonged to.

Q. Did you question anyone in particular, or did you make a general announcement?

A. I made a general announcement.

Q. What did you say?

A. "Does this bag belong to anybody on board this bus?"

Q. Anyone respond?

A. Yes, sir.

Q. Who?

A. Mr. Bond.

[12] Q. What did he say?

A. He said, "Yeah, that's my bag."

Q. Did you begin to talk with him a little bit?

A. Yes, sir.

Q. During your conversation with Mr. Bond, did you notice anything unusual about his demeanor?

A. Yes, he was becoming nervous as I was approaching him with the bag and talking to him about the bag.

Q. I believe you testified that you previously ascertained that he was lawfully in the United States; is that correct?

A. Correct.

Q. Did you begin to suspect that there was another reason for his nervousness?

A. No, sir.

Q. You had no suspicions as to why he was nervous?

A. At that point I was suspicious that he was nervous because of what—the contents of the bag.

Q. What happened then?

A. I asked him for consent to look inside the bag.

Q. And what did he say?

A. "Go ahead, take a look."

Q. Did you look in it?

A. Yes, sir, I did.

Q. What did you find?

A. Found wrapped inside a pair of pants the brick-shaped [13] object—it was wrapped in tape—that we discovered that it was methamphetamines.

Q. Have you found narcotic bricks concealed inside items of clothing inside a bag like this before?

A. Yes, sir, numerous times.

Q. Is that a common or uncommon method of concealment?

A. That is a very common method.

Q. How did you ascertain that the substance in the brick was methamphetamine?

A. It was taken off the bus into the checkpoint and I conducted a reagents test of the substance.

Q. Was this a presumptive chemical field test?

A. Correct, sir.

Q. What did that test tell you?

A. That it was positive for methamphetamines.

Q. What was the next thing you did?

A. At that point, I reboarded the bus, and continued my inspection.

Q. Okay. Now, was Mr. Bond still on the bus?

A. No, sir.

Q. What became of him?

A He was placed inside the checkpoint.

Q. Okay. Did you take him off the bus at the same time you took the brick out?

A. Right.

* * * *

[30] Q. If somebody claims it that doesn't give you consent to look into it, will you take it off the bus?

A. That depends on the circumstances.

Q. Okay. And again, you don't communicate to any of the passengers the difference between the immigration portion of your inspection and the nonimmigration portion?

A. Correct.

Q. And when you got to the back of this bus, you had completed your immigration portion of the inspection?

A. Correct.

Q. And, of course, the entire bus was being held for the immigration inspection; is that correct?

A. Correct.

Q. And it was continuing—it was also being held by the Border Patrol for the nonimmigration inspection?

A. Correct.

Q. Which started once you got to the back of the bus and worked forward?

A. As I was working my way up, yes.

Q. And that's the way you usually do these inspections on buses?

A. Correct, sir.

Q. Now, when you squeeze the bags, do you squeeze them very hard?

A. Yeah. Yes, sir.

[31] Q. Hard enough to break something inside that might be fragile?

A. I haven't yet, sir.

Q. You haven't yet. How do you know?

A. You can usually tell when something breaks if you're squeezing.

Q. How?

A. You can feel the substance you're squeezing break.

Q. Now, of course, you don't request the consent of any of the passengers when you ask them citizenship and immigration questions.

A. I'm sorry?

Q. You don't tell passengers: You are under no obligation to respond to my questions, but I have some questions relating to immigration I want to ask everybody. You don't say that, do you?

A. No, sir, I don't.

Q. On this particular occasion, were you also looking under the seats for luggage?

A. I'm sorry, sir?

Q. On this occasion were you also looking under seats for luggage?

A. There is—yes, sir.

Q. Did you have to ask passengers to move about to look under the seats?

[32] A. Sometimes.

Q. Now, this brick-shaped object, did it have fairly sharp corners?

A. No, sir.

Q. But it was sort of in a rectangular, square shape?

A. Correct.

Q. Do you know whether pictures of these brick-shaped objects were taken?

A. I believe they were, sir.

Q. Okay.

Q. Now, you are authorized by law and regulation, even though you are Border Patrol, to investigate controlled substances related cases and offenses?

A. Yes, sir, we're cross-designated with the DEA.

Q. Now, are you familiar with a case called United States versus Martinez-Fuerte?

A. I recall some of it, yes.

Q. Are you familiar enough to understand that that is a case that authorizes brief—

THE COURT: Why are you discussing law with the witness, counsel?

MR. MAYNARD: Well, just the agent's subjective good faith or bad faith with respect to detaining a vehicle and inspecting for nonimmigration purposes.

* * * *

[Excerpts from Testimony of Steven DeWayne Bond
September 18, 1997]

[DIRECT EXAMINATION]

* * * *

[60] A. I was seated about maybe five seats from the back of the bus.

Q. Okay. Did you turn around to see him doing these things or just noticed them out of the corner of your eye or how did you notice these things?

A. I was watching him to see how he did it.

Q. What was he doing with the bags, the overhead bags?

A. He was squeezing them and moving them side to side.

Q. Was he shaking any of them?

A. Yes.

Q. Any questions of passengers while he was doing this, if you recall?

A. No.

Q. Okay. Now, did there come a time when he got to your row of seats and in the compartment that had your bag?

A. Excuse me?

Q. Did there come a time when the agent came to your row of seats and your bags?

A. Yes.

Q. Your bag. What happened then?

A. He reached for my bag, and he shook it a little, and squeezed it, and then sniffed it, and then he looked, and he asked me if it was my bag, and I told him yes.

Q. Why did you tell him yes?

A. I didn't think I had a choice.

* * * *

[66] CROSS-EXAMINATION

BY MR. NICHOLS:

Q. Mr. Bond, I suppose for better or worse, July 17, 1997 was a memorable day for you, wasn't it?

A. Yes.

Q. Have you ever ridden on a school bus?

A. Yes.

Q. Have you ever ridden on an airplane, on a commercial airliner?

A. Yes, once.

Q. Would you describe the seats on this particular Greyhound as being more like school buses or like commercial airliners?

A. More like a school bus.

* * * *

[Filed Oct. 23, 1997]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

(Caption Omitted in Printing)

ORDER REGARDING DEFENDANTS' MOTIONS TO SUPPRESS EVIDENCE

Defendants Steven Dewayne Bond and Jason Michael Wiggs are charged in a two-count indictment with conspiring to possess methamphetamine and possession of methamphetamine with intent to distribute it. Both Defendants have filed motions to suppress as evidence all fruits of the search of their personal belongings at the Sierra Blanca checkpoint on July 17, 1997. Both Defendants also move to suppress as evidence the statements or confessions attributed to them following their arrest, contending that there are fruits of the poisonous tree.

The testimony of the witnesses at the evidentiary hearing was in conflict. The Court, in its role as fact finder, has been required to make findings of fact as to exactly what occurred. These findings of fact are reflected in the opinion that follows.

Cesar Cantu is a Border Patrol agent stationed at Sierra Blanca, Texas. On July 17, 1997, he was on duty at the Sierra Blanca checkpoint, a Border Patrol checkpoint located on Interstate 10 approximately 85 miles east of El Paso, Texas. At approximately 7:55 p.m. on that date, a Greyhound bus from El Paso arrived at the checkpoint. Agent Cantu got on the bus to check the citizenship or other status of its occupants. He went row by row

to the back of the bus, and discovered no undocumented aliens. On his way back to the front of the bus, Agent Cantu checked the luggage racks above the heads of the seated passengers. This check was not visual only; on occasion he reached in with his hand and felt the suitcases, clothing bags, backpacks, or other items contained in the luggage rack. Four or five rows from the rear of the bus, Agent Cantu felt a bricklike object in a soft-sided green cloth bag. Based on his experience, he thought the bricklike object might be a package of drugs. He immediately asked to whom the green bag belonged. Defendant Steven Dewayne Bond, who was seated in an aisle seat immediately below the green bag, admitted that the bag was his. Bond also struck Agent Cantu as acting somewhat nervous. Agent Cantu asked Bond for consent to search the bag, and Bond gave his consent. Cantu unzipped the green bag and looked inside. Inside the leg of a pair of pants, he found the bricklike object he had felt. Closer examination revealed an oval mass, wrapped in gray duct tape with rounded corners, six or seven inches long by four or five inches wide. Agent Cantu then asked the passenger in the window seat, Defendant Wiggs, whether he was travelling with Bond. Wiggs said that he was. Cantu then removed a backpack from the luggage rack and asked if it belonged to Wiggs. Wiggs said that it did. Agent Cantu then directed both Bond and Wiggs to get off the bus with the two bags. The two young men were turned over to another Border Patrol agent while Agent Cantu completed his inspection of the bus. At that time, the two young men were taken inside the office for questioning. The bus driver was cleared to leave, and the Greyhound bus proceeded on its way. Agent Cantu came inside the office and confronted the two Defendants. He asked Wiggs for consent to search his backpack, and Wiggs gave it. Inside the backpack was another brick-

like object, similar to the one found in Bond's bag. Some of the contents were field tested, and proved positive for methamphetamine. Each brick weighed approximately 1.3 pounds. Agent Cantu then advised both Defendants of their constitutional rights, and they agreed to answer questions. Defendant Bond did most of the talking. He said he was travelling from California to Little Rock, Arkansas, and was transporting the methamphetamine on behalf of a person named Tony Alvarez whom he knew in California. He was to deliver the methamphetamine to someone at a Holiday Inn motel in Little Rock, return to California, and be paid. He admitted that he knew that the bricks contained methamphetamine. Defendant Wiggs did not do much talking. He mostly nodded assent as Bond did the talking. He said nothing to contradict the story being told by Bond.

Agent Cantu contacted the office of the Drug Enforcement Administration in El Paso, and an agent responded to the checkpoint. He reinterviewed the Defendants, and obtained a similar story. Defendant Bond stated that an acquaintance in Merced, California named Tony Alvarez learned that Bond was travelling to Little Rock to visit relatives. Alvarez requested Bond to transport the methamphetamine for a fee. Bond gave his pager to Tony Alvarez, and the understanding was that Bond would "beep" Tony upon his arrival in Little Rock, Arkansas. This time Defendant Wiggs gave a separate statement, admitting that he was knowingly transporting methamphetamine on behalf of Tony Alvarez. He was present at Bond's residence when the parties agreed to the plan, and he heard all of Alvarez's instructions to Bond. Both Defendants were taken into custody and returned to El Paso where they were later indicted.

There is no question that the initial inspection of the bus by Border Patrol Agent Cantu was legitimate and

routine. Agents of the Border Patrol have the authority within 100 miles of the international boundary to stop vehicles at checkpoints and verify the citizenship and/or legal status of their occupants. 8 U.S.C. § 1357(a)(3). In the course of making that inspection, Agent Cantu was authorized to look in the luggage compartments as well. In the process, he felt the outside of Bond's softside green cloth bag. In doing so, he felt the presence of a solid mass reminiscent of a brick. *See: United States v. Karman*, 849 F.2d 928, 929 (5th Cir. 1988). It is well settled that the minimally intrusive touching of the exterior of a bag located in the luggage compartment of a common carrier is neither a search nor a seizure within the meaning of the Fourth Amendment. *United States v. Lovell*, 849 F.2d 910 (5th Cir. 1988); *United States v. Garcia*, 849 F.2d 917 (5th Cir. 1988). Agent Cantu then asked a question about ownership, and Bond replied that the bag was his. Agent Cantu requested Bond's consent to a search of the bag, and Bond gave it. A search by consent is a well recognized exception to the usual warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The Court finds from a preponderance of the evidence that Bond's consent to the search of his bag was voluntary. *United States v. Hurtado*, 950 F.2d 74 (5th Cir. 1990) (en banc). Although Bond testified at the hearing on his motion to suppress evidence, he did not really contend that his consent was not voluntary. All he could do was to express his belief that Agent Cantu would have obtained a search warrant if he had not consented. Once the brick was found, Agent Cantu had probable cause to arrest Bond.

After the discovery of the drug inside his bag, Bond confessed not once but twice. Both confessions were preceded by the administration of proper warnings concerning his constitutional rights. Bond has shown nothing to

render his post-arrest statements inadmissible. Therefore, his motion to suppress both the methamphetamine and his post-arrest statements must be denied.

The case of Defendant Wiggs is a horse of a different color. The Court finds from the evidence that Wiggs was taken off the Greyhound bus and inside the Border Patrol office before the methamphetamine was discovered inside his backpack. Furthermore, the bus driver was cleared to leave the checkpoint, and the bus was driven away. At that point, Agent Cantu had effected a custodial arrest, which required probable cause. Compare *United States v. Bengivenga*, 845 F.2d 593 (5th Cir. 1988) (en banc), *cert. denied* 488 U.S. 924 (1988). However, Cantu did not possess probable cause to arrest Wiggs. With the departure of the bus, Defendant Wiggs was left stranded at a remote location, a million miles from nowhere, with no company other than his handcuffed friend and the polite but unsympathetic Border Patrolmen. Everything that followed, including his alleged "consent" to the search of his backpack and the post-arrest statements he gave were the product of his illegal arrest. *Brown v. Illinois*, 422 U.S. 590 (1975); *Wong Sun v. United States*, 371 U.S. 471 (1963). Between the time of his arrest and the time of his last confession, there were no intervening events or circumstances which purged the primary taint. Therefore, the motion of Defendant Wiggs to suppress as evidence the methamphetamine found in his backpack and his post-arrest statements must be granted.

It is therefore ORDERED that the motion of Defendant Bond to suppress evidence in the above-styled and numbered cause be, and it is hereby, DENIED.

It is further ORDERED that the motion of Defendant Wiggs to suppress all fruits of the arrest, search and

seizure at the Sierra Blanca checkpoint on July 17, 1997, including any post-arrest statements attibuted to him, be, and it is hereby, GRANTED, and both the methamphetamine and his post-arrest statements be, and they are hereby, SUPPRESSED at evidence against him in his case.

SIGNED AND ENTERED this 23d day of October, 1997.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
United States District Judge

[Filed Nov. 13, 1997]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

(Caption Omitted in Printing)

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

Defendant Steven Dewayne Bond previously filed a motion to suppress evidence in this case. Through his motion, Bond was seeking to suppress a quantity of methamphetamine and his confession. On October 23, 1997, the Court denied the motion to suppress evidence. Bond has now filed a motion for reconsideration of that order.

In his motion for reconsideration, the Defendant suggests that Border Patrol Agent Cantu violated his Fourth Amendment rights "by detaining the bus in which Defendant . . . was travelling, so that he could perform a suspicionless inspection of the travellers' overhead luggage in the bus?" (Motion to reconsider, page 1). Specifically, the Defendant states that he wants the Court to review "the scope of the official detention *before* Agent Cantu discovered the oval brick to determine whether it was reasonable under the Fourth Amendment . . . ." (Motion to reconsider, page 3).

The undisputed evidence at the hearing on the motion to suppress evidence showed that a Greyhound Bus from El Paso arrived at the Sierra Blanca checkpoint at 7:55 p.m. on July 17, 1997. Border Patrol Agent Cantu got on the bus to check the citizenship or other status of its passengers. He started at the front of the bus and moved

toward the back, questioning the passengers in each row of seats as he came to that row. When Agent Cantu reached the back of the bus, he looked in the bathroom, where some individual could have been hiding. He then turned around and headed for the front of the bus. As he did so, he looked in the luggage storage compartment located above the seats. As he came to the Defendant's row, something about a softsided green cloth bag in the overhead compartment attracted his attention. He touched the outside of the bag, and could feel a bricklike object. Thinking on the basis of his experience that this might be a package of drugs, he began asking questions of the nearby passengers. This led to the discovery of the fact that Defendant Bond was the owner of the bag and was transporting controlled substances.

This brief review of the evidence demonstrates the farfetched nature of the Defendant's new contention. It is apparently the theory of the Defendant that when Border Patrol Agent Cantu reached the back of the bus, he was required by law to jump out the back window or to race to the front of the bus and jump out the door. He did neither, because he was required to do neither. Instead, after briefly questioning all the passengers and looking inside the bathroom, he began to work his way back to the front of the bus. In the course of doing so, he looked in the overhead luggage compartments.[1] Although this process may have delayed Agent Cantu's exit from the bus for a few seconds or even one or two minutes, the delay was trivial and inconsequential. It was certainly not sufficient to convert this minimally intrusive

---

[1] The motion to reconsider states as a fact that the luggage compartments were incapable of concealing an undocumented alien. The Court does not recall the testimony that way. Although it might be considered improbable, it was not impossible for an alien to conceal himself or herself in the luggage compartments.

detention of a bus at a fixed checkpoint into something forbidden by the Fourth Amendment. *See: United States v. Bengivenga,* 845 F.2d 593 (5th Cir. 1988) (en banc), *cert. denied* 488 U.S. 924 (1988). It is equally clear that the minimally intrusive touching of the exterior of a bag located in the luggage compartment was neither a search nor a seizure within the meaning of the Fourth Amendment. *United States v. Lovell,* 849 F.2d 910 (5th Cir. 1988); *United States v. Garcia,* 849 F.2d 917 (5th Cir. 1988).

It is therefore ORDERED that the motion of Defendant Bond to reconsider the order denying his motion to suppress evidence be, and it is hereby, DENIED.

SIGNED AND ENTERED this 13th day of November, 1997.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
United States District Judge

[Filed Jan. 16, 1998]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

(Caption Omitted in Printing)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, STEVEN DEWAYNE BOND, was represented by William Maynard.

The defendant was found guilty on counts 1 and 2 by the Court on November 24, 1997 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
21 U.S.C. 841 and 846	Conspiring to possess with intent to distribute a quantity of methamphetamine	7-17-97	1
21 U.S.C. 841	Possessing with intent to distribute a quantity of methamphetamine	7-17-97	2

As pronounced on January 8, 1998, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $200.00, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 16th day of January, 1998

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
United States District Judge

Defendant's SSN: 565-61-2811
Defendant's Date of Birth: 2-13-79
Defendant's address: 7215 Tokay Circle; Winston, Ca 95388

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of fifty-seven (57) months as to count 1 and fifty-seven (57) months as to count 2, sentence of imprisonment imposed in count 2 to be served concurrently with that imposed in count 1.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be committed at F.C.I., Lompoc, California.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, wth a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years as to count 1 and three (3) years as to count 2, term of supervised release imposed in count 2 to be served concurrently with that imposed in count 1.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

X If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office for the district in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

X If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

X The defendant shall not own or possess a firearm or destructive device.

X The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the U.S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	25
Criminal History Category:	1
Imprisonment Range:	57 months to 71 months
Supervised Release Range:	3 to 5 years
Fine Range:	$10,000.00 to $4,000.000.00
Restitution:	$

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 98-50074

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STEVEN DEWAYNE BOND,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

Feb. 8, 1999

Before KING, Chief Judge, and DUHE and DEMOSS, Circuit Judges.

DUHE, Circuit Judge:

Drugs were found in Appellant's luggage at a border checkpoint. He appeals the denial of his Motion to Suppress. We affirm.

BACKGROUND

Stephen DeWayne Bond ("Bond") was a passenger on a Greyhound bus that was stopped at the permanent

Border Patrol checkpoint at Sierra Blanca, Texas. Border Patrol Agent Cesar Cantu ("Agent Cantu") diverted the bus into the secondary checkpoint traffic lane to conduct an immigration inspection.

Agent Cantu checked the immigration status of the passengers as he worked his way toward the back of the bus. After he reached the back of the bus and was satisfied that the passengers were lawfully in the United States, Agent Cantu walked back toward the front of the bus. As he did so, he began feeling and squeezing passengers' luggage in the overhead compartments.

As Agent Cantu inspected the luggage in the compartment above Bond's seat, he squeezed a green bag and noticed that the bag contained a "brick-like" object. Bond admitted that the bag was his and consented to its search. While searching the bag, Agent Cantu discovered a "brick" of methamphetamine. After Bond was advised of his *Miranda* rights, Bond admitted that he was transporting the methamphetamine to Little Rock, Arkansas.

Bond was indicted for conspiracy to possess and possession with intent to distribute methamphetamine. Contending that Agent Cantu conducted an illegal search, Bond unsucessfully moved to suppress the methamphetamine and for reconsideration. Bond waived a jury trial and the district court found Bond guilty on both counts of the indictment and sentenced him to 57 months imprisonment. Bond appeals the denial of his motion to suppress.

DISCUSSION

In reviewing a district court's denial of a defendant's motion to suppress, we review factual findings for clear error and conclusions of law *de novo*. *See United States*

v. Carrillo-Morales, 27 F.3d 1054, 1060-61 (5th Cir. 1994). We review the evidence in the light most favorable to the prevailing party. *United States v. Ishmael,* 48 F.3d 850, 853 (5th Cir.1995).

Bond consented to the search of the inside of his bag, therefore, we consider only whether Agent Cantu violated Bond's Fourth Amendment rights prior to Bond's consent to the search. For the following reasons, we conclude that Agent Cantu did not.

I. Whether Squeezing Bond's Luggage Constituted a Search for Fourth Amendment Purposes?

"Government action amounts to a search when it infringes an expectation of privacy that society is prepared to accept as reasonable." *U.S. v. McDonald,* 100 F.3d 1320, 1324 (7th Cir.1996), *cert. denied,* 520 U.S. 1258, 117 S.Ct. 2423, 138 L.Ed.2d 186 (1997) (citing *United States v. Jacobsen,* 466 U.S. 109, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984)). However, "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).

Bond insists that Agent Cantu's manipulation of his bag constituted a search for Fourth Amendment purposes. We disagree. Bond stored his bag in the overhead luggage bin of a Greyhound bus.[1] The bin was a common area of the bus, and it was foreseeable that his bag would be squeezed, moved, and manipulated by others. On common carriers, passengers often handle and manipulate

[1] The record is unclear as to whether the overhead luggage bin was of the open or closed type. Both types of bins are accessible to the general public. Therefore, we conclude that the distinction between open and closed luggage bins is irrelevant for Fourth Amendment purposes.

other passengers' luggage while stowing or retrieving their own luggage. By placing his bag in the overhead bin, Bond knowingly exposed it to the public and, therefore, did not have a reasonable expectaton that his bag would not be handled or manipulated by others.[2] *See McDonald,* 100 F.3d at 1327 (holding that officer's manipulation of bags on the overhead rack of a Greyhound bus was not a search because the defendant "did not have a legitimate expectation that her luggage left in such a place would not be handled by others."); *U.S. v. Guzman,* 75 F.3d 1090, 1095 (6th Cir.1996) (holding that the defendant did not have a reasonable expectation of privacy in the exterior of a bag that he placed on the luggage rack of a Greyhound bus); *United States v. Harvey,* 961 F.2d 1361, 1364 (8th Cir.1992) (stating that "[p]assengers have no objective, reasonable expectation that their luggage will never be moved once placed in an overhead compartment."); *see also United States v. Lovell,* 849 F.2d 910, 915 (5th Cir.1988) (holding that manipulation of the defendant's baggage on an airport baggage carousel was not a search because the defendant did not have a reasonable expectation that the baggage would not be moved or handled); *but see United States v. Nicholson,* 144 F.3d 632, 639 (10th Cir.1998) (holding that the manipulation of luggage stored in an overhead luggage bin was a search within the meaning of the Fourth Amendment).

Conceding that other passengers had access to his bag, Bond contends that Agent Cantu's actions constituted a search because Agent Cantu manipulated his bag in a different way than other passengers would. *See U.S. v.*

[2] We have upheld similar searches in two unpublished opinions. *See United States v. Cook,* 992 F.2d 323, 1993 WL 152244 (5th Cir. 1993); *United States v. Wilson,* 987 F.2d 770, 1993 WL 67230 (5th Cir.1993); *see* 5th Cir. R. 47.5.3.

Nicholson, 144 F.3d 632, 639 (10th Cir.1998) (reasoning that manipulation of the defendant's bag constituted a search because detectives squeezed the bag in a way that revealed more about the bag's contents than manipulation by other passengers may have). We reject this argument. The fact that Agent Cantu's manipulation of Bond's bag was calculated to detect contraband is irrelevant for Fourth Amendment purposes. In *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 1813-14, 90 L.Ed.2d 210 (1986), the Supreme Court held that a defendant who grew marijuana plants in his backyard knowingly exposed those plants to aerial observation. The Court observed that the fact that "the observation from [the] aircraft was directed at identifying the plants and the officers were trained to recognize marijuana [was] irrelevant." *Id.* at 1813. Accordingly, we hold that Agent Cantu's manipulation of Bond's bag was not a search within the meaning of the Fourth Amendment.

II. Whether the Luggage Inspection at the Checkpoint Exceed the Limits Imposed by United States v. Martinez-Fuerte?

Bond insists that the continued detention of the bus and its passengers after the immigration inspection was completed exceeded the strict limits for such inspections set forth by the Supreme Court in *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). He argues that detentions may last only long enough to ask questions and check citizenship status. *See United States v. Jackson*, 825 F.2d 853, 862 (5th Cir.1987). Noting that the *Martinez-Fuerte* Court forbade further detention without consent or probable cause, Bond maintains that Agent Cantu's luggage inspection occurred after he concluded that all passengers on the bus were lawfully in the United States and was, therefore, impermissible. *See Martinez-Fuerte*, 96 S.Ct. at 3087.

We reject Bond's reading of *Martinez-Fuerte*. In the case at bar, the bus had no rear exit and Agent Cantu inspected the luggage compartment during his return to the front of the bus. There is no evidence that Agent Cantu's inspection of the overhead luggage compartment delayed the bus' departure more than an additional one or two minutes.[3] We do not read *Martinez-Fuerte* to mean that once Agent Cantu reached the back of the bus, he was required to jump out a window or sprint back to the front of the bus and jump out the door. Therefore, we conclude that the trivial delay caused by Agent Cantu's inspection did not violate the strict limits of a border checkpoint stop. *See United States v. Muniz-Melchor*, 894 F.2d 1430, 1432, 1436-37 (5th Cir.1990) (tapping on the side of a truck's propane tank at a checkpoint was permissible even though the driver had already produced valid documentation).

Although Bond concedes that *Martinez-Fuerte* allows a visual inspection of areas that can be seen without a search, he contends that Agent Cantu's inspection was impermissible because it went beyond a visual inspection of the bus. *See Martinez-Guerte*, 96 S.Ct. at 3083 (stating that, in a border checkpoint stop, "[n]either the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search."). We disagree. We have repeatedly permitted checkpoint inspections that were not visual but did not constitute searches. *See, e.g., United States v. Hernandez*, 976 F.2d 929, 930 (5th Cir.1992) (permitting dog sniff at checkpoint); *Muniz-Melchor*, 894 F.2d at 1435-37 (holding that tapping on the side of a truck's propane tank at a checkpoint was permissible). Because Agent Cantu's inspection was not a search, the fact that it was tactile rather than visual did not make it impermissible.

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[3] In fact, the entire stop lasted only between five and ten minutes.

CONCLUSION

We affirm the denial of Bond's motion to suppress.

AFFIRMED.

No. 98-9349

IN THE

Supreme Court of the United States

STEVEN DEWAYNE BOND,
Petitioner,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

M. CAROLYN FUENTES *
Assistant Federal Public Defender

LUCIEN B. CAMPBELL
Federal Public Defender

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* Counsel of Record

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a search occurs when a law enforcement officer manipulates a bus passenger's personal carry-on luggage to determine its contents.

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OPINIONS AND ORDERS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit in *United States v. Bond*, 167 F.3d 225 (5th Cir. 1999), is reproduced in the Joint Appendix at 36-42. The district court's unreported orders denying Bond's motion to suppress and his motion to reconsider are reproduced in the Joint Appendix at 20-25, 26-28.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on February 8, 1999. Bond's petition for certiorari was timely filed on May 10, 1999, and was granted on October 12, 1999. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

After a bench trial in the U.S. District Court for the Western District of Texas, Petitioner Steven Dewayne Bond was convicted of possessing and conspiring to possess methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. He was sentenced to 57 months' imprisonment followed by a term of supervised release. The court of appeals affirmed his convictions.

Bond's Arrest. Bond's convictions were based on methamphetamine that was discovered in his carry-on luggage while he was traveling as a passenger on a Greyhound bus. The methamphetamine, which weighed 1.3 pounds, was wrapped in gray duct tape until it formed an oval-shaped mass. (J.A. 14; Tr. 12-13, 18, 53.)[1] The taped package was wrapped again in a pair of pants, and then placed inside a green canvas bag, along with clothing and food. (J.A. 12-14; Tr. 10, 12-13, 54-55.) The bag, measuring about a foot and a half long by a foot wide, was zipped shut. (J.A. 12; Tr. 10, 64.) Bond put his bag in the luggage bin directly over his seat on the bus. (J.A. 10; Tr. 8.)

As Bond traveled from California to Arkansas, his bus was required to stop at an immigration checkpoint operated by the U.S. Border Patrol near Sierra Blanca, Texas. (J.A. 6-7; Tr. 3-4, 25, 48.) The checkpoint, which is not on the U.S.-Mexico border, is located east of El Paso on Interstate Highway 10. (J.A. 6-7; Tr. 2-3, 25.) All buses entering the checkpoint are regularly diverted to a secondary inspection lane so that agents can board them and question passengers about their citizenship. (J.A. 6-8; Tr. 3-4, 28.) Approximately 12 to 16 buses enter the checkpoint daily, each of them carrying between 15 to 45 passengers. (Tr. 25.) Bond's bus, which could accommodate "at least 45" passengers, was nearly full. (Tr. 25, 67.)

Border Patrol Agent Cesar Cantu Jr. was on duty when Bond's bus arrived at the checkpoint. Following his routine, Cantu boarded the bus and walked from the front

[1] The Joint Appendix is cited as "J.A. [page]"; the transcript of the hearing on Bond's Motion to Suppress is cited as "Tr. [page]"; and the record of the court of appeals is cited as "[volume] C.A. [page]."

to the back conducting his immigration inspection. Once he was satisfied that all on board were lawfully in the country, Cantu began a "nonimmigration inspection" for drugs, working from the back to the front.[2] (J.A. 6-8, 10-11, 15; Tr. 2-4, 8, 30, 42-43.)

Continuing his routine, Agent Cantu worked his way out of the bus by "feeling and squeezing" the passengers' carry-on luggage stored in overhead bins. (J.A. 9-11, 15, 37; Tr. 6-9, 30, 38-39, 42.) In addition to manipulating luggage in the overhead bins, Cantu looked for luggage under the seats, sometimes asking passengers to move to conduct his inspection. (J.A. 9, 16; Tr. 6, 31-32.)[3]

"[S]queezing as many bags as [he] could on the way out" of the bus, Cantu came to the green canvas bag that Bond had placed above his seat. (J.A. 10-12; Tr. 8-10, 38.) The agent "felt" the bag and "squeezed" it "very hard"—hard enough to identify "a brick-like object" with "an outline of something of different mass inside of it." (J.A. 10-11, 15; Tr. 8-9, 30.)[4] Agent Cantu's tactile examination permitted him to feel the "edges of the brick." (J.A. 12; Tr. 10-11.) Based on this manipulation and his experience, the agent thought the brick-shaped object was narcotics. (J.A. 12; Tr. 10-11.)

[2] Cantu believed he had authority to inspect for narcotics based on an unspecified understanding between the Border Patrol and the Drug Enforcement Administration (DEA). (Tr. 33-34, 42.)

[3] In the commercial buses that Agent Cantu regularly inspected, the physical characteristics of the overhead bins varied: some were open, and others were closed compartments with a door and a latch. (J.A. 6-10; Tr. 3-4, 6-7.) If a bus had closed bins, Cantu would open all the bins so that he could "go along feeling of bags." (J.A. 9-10; Tr. 7.) Cantu could not remember whether the bins in Bond's bus were open or closed. (J.A. 9; Tr. 6-7.)

[4] Bond and his companion, James Wiggs, testified that Cantu grabbed, shook, squeezed, and sniffed the bag. (J.A. 18; Tr. 60, 71.)

Agent Cantu asked who owned the green bag, and Bond replied that he did. (J.A. 13; Tr. 12.) When the agent asked if he could open the bag, Bond said "go ahead." (J.A. 13-14; Tr. 12, 61.) Cantu opened the bag and found methamphetamine. (J.A. 14; Tr. 13, 19.) He advised Bond of his *Miranda* rights [5] and questioned him. (Tr. 14, 19.) Bond admitted that he possessed the methamphetamine and told the agent how he had come to have it. (Tr. 20-21.) Bond confessed again later, after another advisement of rights. (Tr. 44-51.)

The Motion to Suppress. Bond moved to suppress the methamphetamine and his confessions. (1 C.A. 17-25.) At the hearing on the motion, Agent Cantu testified that his squeezing and feeling of Bond's luggage was not based on any individualized suspicion, but was part of his routine inspection of bus passengers' luggage for drugs. (J.A. 9-12; Tr. 6, 8-11, 38.) The district court found that Cantu's actions were not a search and denied the motion to suppress. (J.A. 20-28.)

The Appeal. On appeal, Bond argued that the agent's manipulation of his carry-on luggage was a search, conducted without reasonable suspicion, probable cause, or consent. The U.S. Court of Appeals for the Fifth Circuit rejected this contention. Although finding that "Agent Cantu's manipulation of Bond's bag was calculated to detect contraband," the court held that the agent's manipulation of the luggage was not a search for Fourth Amendment purposes. (J.A. 40.) The court reasoned:

> Bond stored his bag in the overhead luggage bin of a Greyhound bus. The bin was a common area of the bus, and it was foreseeable that his bag would be squeezed, moved, and manipulated by others. On common carriers, passengers often handle and manipulate other passengers' luggage while stowing or retrieving their own luggage. By placing his bag in the overhead bin, Bond knowingly exposed it to the public and, therefore, did not have a reasonable expectation that his bag would not be handled or manipulated by others.

(*Id.* at 38-39).

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

SUMMARY OF THE ARGUMENT

A Fourth Amendment Search Occurred When a Law Enforcement Officer Manipulated Bond's Carry-On Luggage to Determine Its Contents.

Around the country, law enforcement officers—acting without probable cause, reasonable suspicion, or consent—manipulate travelers' carry-on luggage to inspect it for drugs. Such inspections are Fourth Amendment searches. The Fifth Circuit Court of Appeals, however, ruled that they are not. The court reasoned that no search occurs because travelers who place their luggage in an overhead bin expose it to handling by others, and consequently have no expectation of privacy in their luggage. The Fifth Circuit was incorrect. Travelers like Bond may subject their luggage to casual contact from others by placing it in an overhead bin. But neither Bond nor any other traveler knowingly exposes his luggage to the sort of intrusive and revealing manipulation that Agent Cantu used to inspect luggage. Cantu's manipulation of Bond's carry-on bag infringed Bond's reasonable expectation of privacy in his luggage and therefore was a search.

A. The Fourth Amendment specifically protects "persons, houses, papers, and effects" against unreasonable search and seizure. Luggage is a repository of one's personal "effects" and society accepts as reasonable the ex-

pectation that the contents of luggage will remain private. Bond manifested and preserved his expectation that the contents of his luggage would remain private by carrying his bag onto the bus and placing it in the overhead bin directly above his seat.

B. By manipulating Bond's carry-on bag in a manner calculated to reveal its contents, Agent Cantu infringed Bond's reasonable expectation of privacy. The agent's manipulation of Bond's bag bore the hallmarks of a search: it was physically intrusive, and it revealed private information about the contents of Bond's personal luggage. Like a patdown of outer clothing to find weapons, or manipulation of a pocket to investigate its contents—inspections that this Court has held are searches—Agent Cantu's tactile examination of Bond's luggage was a search.

C. The Fifth Circuit incorrectly concluded that Bond gave up the expectation of privacy in his luggage when he exposed it to the public by placing his bag in an overhead luggage bin. Neither Bond nor any other traveler relinquishes the expectation that the contents of a carry-on bag will remain private by temporarily stowing it in an overhead bin. Luggage is meant to secure the privacy and safety of one's personal effects while traveling. The Fourth Amendment's protection of luggage means nothing if merely placing a bag in an overhead bin extinguishes the expectation of privacy in its contents. By putting his bag in the bin, Bond might have subjected it to casual contact by other passengers, but Agent Cantu's squeezing and feeling of Bond's bag far exceeded what Bond could reasonably have expected from other passengers. Cantu thus conducted a search when he manually inspected Bond's bag for drugs by squeezing and feeling it—manipulation that Bond would never have reasonably expected from his fellow passengers.

ARGUMENT

A FOURTH AMENDMENT SEARCH OCCURRED WHEN A LAW ENFORCEMENT OFFICER MANIPULATED BOND'S CARRY-ON LUGGAGE TO DETERMINE ITS CONTENTS.

For purposes of the Fourth Amendment, a search occurs when the government infringes an individual's reasonable expectation of privacy. Bond, a passenger on a Greyhound bus, had a reasonable expectation of privacy in the carry-on bag that he placed in the overhead bin directly above his seat. Agent Cantu infringed Bond's expectation that the contents of his luggage would remain private when he manipulated Bond's bag in a manner calculated to determine whether it contained drugs. The agent's intrusive tactile examination of Bond's bag—undertaken without probable cause, reasonable suspicion, or consent—deprived Bond of the Fourth Amendment right "to be secure in [his] . . . effects, against unreasonable searches."

A. Bond Had a Reasonable Expectation of Privacy in the Contents of His Carry-On Luggage.

The Fourth Amendment's prohibition against unreasonable searches protects those "expectation[s] of privacy that society is prepared to consider reasonable." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Society considers it reasonable for travelers like Bond to expect that the contents of their luggage will remain private. This Court has recognized that "a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment." *United States v. Place*, 462 U.S. 696, 707 (1983); *see also New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (Fourth Amendment protects personal luggage).

Travelers have a privacy interest in luggage because "luggage is intended as a repository of personal effects."

United States v. Chadwick, 433 U.S. 1, 13 & n.8 (1977), *abrogated on other grounds, California v. Acevedo*, 500 U.S. 565 (1991).[6] One's "effects" are explictly protected by the text of the Fourth Amendment, and the Framers of the amendment would have understood the term "effects" to include personal property—property like the contents of Bond's carry-on luggage. *See Oliver v. United States*, 466 U.S. 170, 177 n.7 (1984) ("effects" in Fourth Amendment refers to personal, not real property); *see also Cardwell v. Lewis*, 417 U.S. 583, 591 (1974) (Fourth Amendment traditionally deemed to protect personal effects).[7]

Bond manifested his privacy expectation by carrying his closed luggage onto a Greyhound bus for his trip from California to Arkansas. Instead of checking his bag, Bond kept it in his control by placing it in the overhead bin directly above his seat. With his luggage close by, Bond had a reasonable expectation that its contents would remain private.

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[6] In *Acevedo*, this Court analyzed inconsistent Supreme Court authority governing the search of containers in automobiles—authority that included the *Chadwick* case. 500 U.S. at 565-80. The Court concluded that "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained," but did not question the privacy interest in luggage. 500 U.S. at 580.

[7] During the post-revolutionary period, there was an outcry against searches of travelers' portmanteaus and saddlebags—showing that travelers have long had a special privacy interest in their personal luggage. *See* William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 1518-19 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Services); BENJAMIN GALE, BRIEF REMARKS ON SEVERAL LAWS 44 (Hudson & Goodwin, 1782) (title abbreviated). Objecting to such searches, Benjamin Gale wrote in 1782: "the practice is most infamous, and I would put up with a little smuggling, infamous as it is, sooner than give up the essential rights of a citizen of a Free State." GALE, *id.; see also* Cuddihy, at xxxiii, 1518-19.

B. Agent Cantu's Exploratory Tactile Examination of Bond's Bag Was a Search Because It Infringed Bond's Reasonable Expectation of Privacy in the Contents of His Luggage.

Using his sense of touch, Agent Cantu examined Bond's bag from the outside. Such examination constitutes a search when it is designed to reveal the presence of objects that are hidden from view. *See Minnesota v. Dickerson*, 508 U.S. 366, 378-79 (1993) (feeling outside of jacket pocket to investigate its contents was search); *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (frisk of outer clothing for weapons was search). With regard to a person's clothing, this Court has observed that "it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces . . . in an attempt to find weapons is not a 'search.'" *Terry*, 392 U.S. at 16. It would likewise torture the English language to say that Agent Cantu's manipulation of the outside of Bond's luggage, in an attempt to find drugs, was not a search. Like the frisk at issue in *Terry*, Cantu's feeling and squeezing of Bond's bag was aimed at revealing hidden objects; it was calculated to reveal items with a size, shape, density, or other characteristic that indicated the presence of drugs. Cantu's exploratory manipulation was a search as that term is commonly understood.[8]

Cantu's actions were also a search under the Fourth Amendment, because they infringed Bond's reasonable

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[8] Since before the Fourth Amendment was drafted, to "search" has meant to "examine (a person) by handling, removal of garments, etc. in order to locate any concealed article." 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2746 (1993) (late Middle English usage 1350-1469); *see also Hernandez v. United States*, 353 F.2d 624, 626 (9th Cir. 1965) (search is "an 'exploratory investigation'" or "a 'prying into hidden places for that which was concealed . . . .' 38 Words & Phrases 401-02 (Perm. 2d), 123-26 (1965 P.P.)").

expectation of privacy. There is no talisman for determining whether government action constitutes a Fourth Amendment search But two factors are often significant: (1) whether government action was physically intrusive; [9] and (2) whether it was capable of revealing information about private matters.[10] Both these factors brand Agent Cantu's manipulation of Bond's bag as a search. It was physically intrusive, and it revealed information about the bag's contents—contents that traditionally have been protected by the Fourth Amendment.

1. *Agent Cantu's manipulation of Bond's luggage was physically intrusive.*

Physical intrusion by a government agent is neither necessary nor sufficient to find that a Fourth Amendment search occurred.[11] Such intrusion often constitutes a search, however, because it generally compromises privacy interests. *See Dickerson,* 508 U.S. at 378-79 (1993) (squeezing, sliding, and manipulating lump of cocaine is search); *Arizona v. Hicks,* 480 U.S. 321, 324-25 (1987) (moving stereo components in home is search); *Terry,*

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9 *See, e.g., Florida v. Riley,* 488 U.S. 445, 449 (1989) (plurality opinion) (observations of home and curtilage "not necessarily protected from inspection that involves no physical invasion"); *California v. Ciraolo,* 476 U.S. 207, 213 (1986) (observations from public navigable airspace "in a physically nonintrusive manner" not a search); *Dow Chemical Co. v. United States,* 476 U.S. 227, 237 (1986) (aerial observation "without physical entry" not a search).

10 *See, e.g., Dow Chemical Co.,* 476 U.S. at 238 (no search when photographs taken from air "not so revealing of intimate details as to raise constitutional concerns"); *Jacobsen,* 466 U.S. at 123 (no search when government conduct incapable of revealing any "arguably 'private' fact").

11 *See Katz v. United States,* 389 U.S. 347, 352-53 (1967) (not necessary); *Oliver,* 466 U.S. at 182-84 (not sufficient).

392 U.S. at 16-17 (patting down suspect's outer clothing is search).

In *Dickerson,* for example, this Court concluded that a search occurred when a police officer engaged in a tactile inspection similar to the inspection conducted by Cantu. 508 U.S. at 378. While frisking Dickerson's outer clothing for weapons, the officer discerned a small hard object in his pocket—an object that could not have been a weapon. *Id.* at 377-78. The officer did not look or reach into Dickerson's jacket pocket to investigate its contents; instead, he manipulated the object through the fabric of the pocket. *Id.* at 379. This Court found that the officer's "squeezing, sliding and otherwise manipulating the contents of [the] pocket," was a "further search" subject to Fourth Amendment constraints. *Id.* at 377-79.

Agent Cantu conducted the same sort of tactile inspection of Bond's luggage. Feeling through the fabric of Bond's carry-on canvas bag, Agent Cantu used his sense of touch to investigate its contents. Cantu testified that he first "felt" Bond's carry-on bag. (J.A. 10; Tr. 8.) That is, he examined and explored Bond's luggage using his sense of touch.[12] The agent then "squeezed" the bag. (J.A. 11; Tr. 9.) In other words, he compressed Bond's luggage by applying strong or heavy pressure to it with his hand.[13] Cantu admitted that he squeezed Bond's bag

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12 To "feel," in this sense, means "to examine or explore by touching." 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 929 (1993).

13 To "squeeze" means "to press forcefully together," or to "enclose . . . in one's hand and apply pressure." RANDOM HOUSE UNABRIDGED DICTIONARY 1851 (2d ed. 1993). A squeeze is "an application of strong or heavy pressure," 16 THE OXFORD ENGLISH DICTIONARY 410 (2d ed. 1989), and involves the exertion of "pressure . . . from opposite or all sides . . . so as to force together[.]" 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 3014 (1993).

"very hard." (J.A. 15; Tr. 30.) Cantu's manipulation of Bond's luggage was so intrusive that it allowed him to discern "a brick-like object" with "an outline of something of different mass inside of it." (J.A. 11; Tr. 9.) Although the brick of methamphetamine in Bond's luggage was heavily covered in duct tape, wrapped in a pair of pants, and contained in a canvas bag, the agent's tactile inspection was probing enough to reveal the "edges of the brick," a brick that was "hard." (J.A. 12, 14; Tr. 10, 12-13, 53.)

Agent Cantu's probing manipulation of Bond's bag was closely akin to the squeezing and sliding manipulation that occurred in *Dickerson*. It was more physically intrusive than moving a piece of property—an intrusion that this Court has found constituted a search. *See Hicks*, 480 U.S. at 324. Because of its intrusiveness, Cantu's exploratory tactile examination of Bond's bag "amounted to the sort of evidentiary search" that is subject to Fourth Amendment constraints. 508 U.S. at 378.

2. *Agent Cantu's manipulation of Bond's luggage revealed its contents.*

Agent Cantu's exploratory tactile examination of Bond's luggage was also a Fourth Amendment search because of the private information that it revealed. The "protection of privacy" is the "principal object of the Amendment." *Soldal v. Cook County, Ill.*, 506 U.S. 56, 64 (1992) (internal quotation omitted). Consequently, government action that reveals information about private matters often constitutes a search. *See Hicks*, 480 U.S. at 325 (moving stereo equipment revealed information about home); *United States v. Karo*, 468 U.S. 705, 715 (1984) (monitoring of "beeper" revealed fact about interior of home); *Katz*, 389 U.S. at 352-53 (electronic eavesdropping revealed contents of private telephone conversation).

In *Hicks*, this Court held that a search occurred when a police officer moved a piece of stereo equipment in Hicks's apartment. 480 U.S. at 324-25. Although the officer was legitimately in the apartment, moving the equipment invaded Hicks's protected privacy interest by revealing hidden information about the apartment's contents —serial numbers that appeared only on the bottom of a turntable. *Id.*

Like the moving of the turntable in *Hicks*, Agent Cantu's manipulation of Bond's luggage invaded a protected privacy interest because it revealed information about a private matter—the contents of Bond's luggage. The agent's manipulation revealed detailed and specific information about an item contained in Bond's luggage: a hard, brick-like object, with defined edges, and "something of different mass inside of it." (J.A. 11-12, Tr. 9, 10-11.) Based on this specific information, Cantu thought he had found drugs. (J.A. 12-13; Tr. 10-11.)

This Court has recognized that touch is an effective means of discovering specific information about hidden items: the "sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure" of the object felt. *Dickerson*, 508 U.S. at 376. In this case, the Fifth Circuit found that Agent Cantu's techniques were "calculated" to make precisely this sort of discovery. (J.A. 40.)

Such techniques are typical when an officer manipulates the outside of luggage to reveal its contents. Using his sense of touch, the officer must feel his way through the various contents of personal luggage to determine whether any of those contents has a size, shape, or density indicative of packaged drugs. The officer's "tactile inspection [is] . . . aimed at discovering the nature of the contents of the bag." *United States v. McDonald*, 100 F.3d 1320,

1333 (7th Cir. 1996) (Ripple, J., dissenting) (rejecting court's holding that manipulation of luggage not search). He must "work" a bag with his hands to "determine whether it contain[s] something of independent evidentiary value." *United States v. Nicholson*, 144 F.3d 632, 639 (10th Cir. 1998) (holding manipulation of luggage was search). The officer's manual probing must be sufficiently intrusive to permit identification of the internal contents of the luggage. *See McDonald*, 100 F.3d at 1333 (Ripple, J., dissenting). While Cantu was not questioned about what other contents of Bond's luggage were revealed by his manual inspection, a probing manipulation that is calculated to disclose seizable items is likewise capable of identifying any number of other objects that are commonly carried in personal luggage.

Of course, neither Agent Cantu's nor any other officer's subjective intent determines whether a Fourth Amendment search has occurred. *See Ciraolo*, 476 U.S. at 213-14 & n.2 (officer's intent to look for marijuana irrelevant). It is not the officer's purpose, but the means necessary to achieve that purpose which is subject to Fourth Amendment scrutiny. *Cf. Maryland v. Buie*, 494 U.S. 325, 335 (1990) (considering "aim" of a protective sweep); *Dickerson*, 508 U.S. at 378 (considering officer's purpose not to search for weapons, but to search for evidence); *Terry*, 392 U.S. at 16 (limited purpose of frisk was "to find weapons"). The manipulation necessary to reveal contraband packed in luggage is probing, physically intrusive, and revealing. Objectively considered, it constitutes a search, just as the similar manipulation in *Terry* and in *Dickerson* was found to be a search.

While *Terry* and *Dickerson* involved searches of a person, "persons" receive no more protection under the plain terms of the Fourth Amendment than the "effects" contained in Bond's luggage. Personal effects may be carried in one's luggage as readily as they may be carried in one's jacket pocket. It would be anomalous to find that the Fourth Amendment is implicated when a law enforcement officer "works" a pocket to discover its contents, but not when he "works" personal luggage for the same purpose. In either case, the officer's action is a serious infringement of privacy interests and, consequently, a search.

3. *The physical intrusiveness of Agent Cantu's exploratory manipulation, and the information it revealed, distinguish his actions from the dog sniff in* United States v. Place.

In *Place*, this Court considered whether a search occurred when DEA agents permitted a drug-detecting dog to sniff a traveler's luggage. 462 U.S. at 707. As the Court observed, the dog sniff was uniquely nonintrusive: "We are aware of no other investigative procedure that is so limited . . . in the manner in which the information is obtained[.]" *Id.* The dog sniff was also uniquely limited in the information it revealed. It disclosed only the presence or absence of contraband, and it was incapable of revealing anything else about the contents of Place's luggage. *Id.* Because the dog sniff was not intrusive, and because it could reveal nothing about the noncontraband contents of Place's luggage, this Court held that it was not a search. *Id.; see also Jacobsen*, 466 U.S. at 123-24 & n.24 (chemical test of white powder not search because, like dog sniff, it "could reveal nothing about noncontraband items").

The Court's narrow decision in *Place* has no application to the far more intrusive and revealing investigation conducted here. Unlike the dog sniff in *Place*, an exploratory feeling and squeezing manipulation is physically intrusive, and it reveals more than just the presence or absence of

contraband in a traveler's luggage. A "tactile examination" of luggage is capable of "reveal[ing] almost as much information as opening the bag itself, such as information about the number, the shape, and character of items, perhaps very personal items, inside the bag." *United States v. Gwinn*, 191 F.3d 874, 879 (8th Cir. 1999) (holding that manipulation of luggage is search). As illustrated by Agent Cantu's testimony, it was this sort of probing and intrusive manual inspection that occurred in Bond's case. Unlike the dog sniff in *Place*, an exploratory tactile examination like Cantu's infringes a traveler's reasonable expectation of privacy in the contents of his luggage.

C. Bond Did Not Relinquish His Reasonable Expectation of Privacy by Placing His Bag in the Luggage Bin Directly Over His Seat.

The Fifth Circuit Court of Appeals found that Bond had no reasonable expectation of privacy in his carry-on bag because he "knowingly exposed it to the public" by putting it in the overhead luggage bin on the Greyhound bus. (J.A. 39.) Observing that the bin was accessible to other bus passengers, the court reasoned that Bond could have expected his bag would be handled by others. *Id.*

The Fifth Circuit's ruling failed to recognize two crucial factors. First, luggage is designed to preserve the privacy and security of one's personal effects while traveling; privacy expectations are not forfeited when a traveler temporarily stows his luggage nearby as he travels. Second, Agent Cantu's feeling and squeezing of Bond's bag exceeded the incidental and casual contact that Bond would have expected from his fellow passengers. Bond could not have reasonably expected other passengers to feel and squeeze his luggage to discern its contents, thus he did not knowingly expose it to the type of intrusive tactile examination Cantu used to inspect luggage. By placing his bag

in the overhead bin. Bond did not relinquish his privacy interest in its contents.

1. *Travelers like Bond do not relinquish their reasonable expectation of privacy in luggage by putting it in an overhead bin.*

The "Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. Thus, "[w]hat a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.; see also O'Connor v. Ortega*, 480 U.S. 709, 730 (1987) (Scalia, J., concurring) ("It is privacy that is protected by the Fourth Amendment, not solitude."). Travelers like Bond preserve the privacy of their personal effects by placing them in luggage when they leave their homes. Luggage, by definition, is designed to carry one's personal effects while traveling. Traveling, a right protected by the Constitution, necessarily is done in places that are accessible to the public.

Travelers take their luggage into public terminals when leaving or arriving on buses and trains. Those buses and trains carry passengers on public thoroughfares while they travel. Carrying luggage through places that are accessible to the public does not mean that the right to expect privacy in the contents of that luggage is forfeited. *See Place*, 462 U.S. at 707 (privacy expectation in luggage contents at airport); *Chadwick*, 433 U.S. at 4-6 (privacy expectation in luggage at train station). To the contrary, one places personal effects in luggage in order to secure their privacy and safety while traveling. *See T.L.O.*, 469 U.S. at 337-40 (personal luggage conceals contents from plain view).

Putting luggage in a place accessible to others may affect one's expectation of privacy "in the existence and

the outward appearance of the luggage." *Ortega*, 480 U.S. at 716 (plurality opinion) (taking closed luggage to workplace). But the "expectation of privacy in the contents of the luggage is not affected in the same way." *Id.* That is so precisely because, as the repository of one's "effects," luggage is meant to keep personal effects private even in, and perhaps especially in, areas accessible to the public.

In this case, Bond manifested his expectation of privacy in the contents of his luggage by putting it in the overhead bin directly above his seat. By stowing his bag close by, Bond kept control of it; he retained the ability to prevent other passengers from interfering with it. Agent Cantu, by his show of authority, did what other passengers would not have been expected—or permitted—to do: he examined and explored Bond's carry-on luggage by feeling and squeezing it to determine its contents. By putting luggage in an overhead bin, neither Bond nor any other passenger relinquishes his right to be free from such an intrusive governmental invasion of protected privacy interests.

2. Bond did not knowingly expose his bag to an intrusive manipulation calculated to detect its contents.

When he put his bag in the bin above his seat, Bond knowingly exposed the outward appearance of his luggage to the view of other passengers. He may even have expected that other bus passengers would come into casual contact with his bag, pushing or moving it as they stored their own luggage in the overhead bin. *See Gwinn*, 191 F.3d at 879 (passengers may push aside or briefly touch others' bags); *Nicholson*, 144 F.3d at 639 (passengers may push or move others' bags). But Agent Cantu's

squeezing and feeling of Bond's luggage far exceeded the casual contact Bond could have expected from other passengers. Neither Bond nor any other person "traveling by bus or rail would expect, or permit, a fellow passenger to . . . squeeze or manipulate his or her hand baggage in a concerted attempt to determine the contents." *McDonald*, 100 F.3d at 1334 (Ripple, J., dissenting); *Gwinn*, 191 F.3d at 879 (majority of traveling public would not expect overhead luggage "to be subject to a calculated and thorough squeezing and manipulation").

When government action exceeds what could reasonably be expected from others, it cannot be said that one has knowingly exposed his protected privacy interests to that action. The Court made this distinction in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). In that case, a local magistrate accompanied police to an adult bookstore where he viewed films and examined books and magazines offered for sale to determine whether they were obscene. *Id.* at 322-23. Unlike a member of the public, the magistrate neither paid to view the films nor bought the publications he inspected. Instead, he directed the bookstore's proprietor to disable the coin-operated film projectors before he viewed the films, and he had police remove cellophane wrappers from books and magazines, as well as take items from a glass-enclosed case. *Id.*

The government contended that there was no expectation of privacy in these items because the bookstore proprietor displayed the films and magazines in a place where the public was invited to enter. 442 U.S. at 329. This Court disagreed. Although the magistrate was in an area accessible to the public, he was not seeing the books and films "as a customer would ordinarily see them." *Id.* Consequently, the bookstore's proprietor retained a reasonable expectation of privacy against government intrusion

into the property that he offered for sale. *Id.; see also Nicholson,* 144 F.3d at 639 (police manipulation that exceeded what could reasonably be expected from others was search); *United States v. Most,* 876 F.2d 191, 198 n.13 (D.C. Cir. 1989) (same).[14]

Agent Cantu did not handle Bond's bag as other passengers would reasonably have been expected to handle it. Instead, Cantu squeezed and felt Bond's luggage in a manner calculated to reveal its contents. Passengers traveling by common carrier do not engage in an exploratory examination of one another's bags using their sense of touch. Neither do they squeeze one anothers' personal luggage as Cantu did—they do not manipulate luggage in a manner calculated to reveal its contents.

By placing his luggage in the overhead bin, Bond might have subjected it to fellow passengers' casual contact. But he certainly did not knowingly expose it to the intrusive and exploratory manipulation that Agent Cantu used to inspect its contents. When Agent Cantu felt and squeezed Bond's luggage, he infringed Bond's reasonable expectation of privacy.

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[14] Indeed, Bond's "exposure" of his luggage on the Greyhound bus was significantly more limited than the exposure of property in the adult bookstore in *Lo-Ji Sales.* The general public was invited to enter the store: but only paying passengers and perhaps bus employees were invited to board the bus. *But see Bond,* 167 F.3d at 226 n.1 (bins accessible "to the general public"). (J.A. 38.) As access to the general public becomes more limited, greater limits are placed on intrusions by the government. *See Mancusi v. DeForte,* 392 U.S. 364, 369-70 (1968) (employees have expectation of privacy against intrusions by police at workplace); *Ortega,* 480 U.S. at 730 (Scalia, J., concurring) (exposure of home to spouse and children does not extinguish expectation of privacy against intrusion by government); *Most,* 876 F.2d at 197-98 (entrusting bag to care of grocery clerk did not relinquish expectation of privacy vis-a-vis police).

"The basic purpose" of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court,* 387 U.S. 523, 528 (1967). The amendment "gives concrete expression to the right of the people which is basic to a free society." *Id.* (internal quotation and citation omitted). It guarantees "the right to be let alone—the most comprehensive of rights and the right most valued by civilized" society. *Winston v. Lee,* 470 U.S. 753, 758 (1985) (quoting *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Agent Cantu's "inspection" of bus passengers' luggage for drugs was an arbitrary government invasion that violated the privacy and security the Fourth Amendment was meant to preserve.

Acting without probable cause, reasonable suspicion, or consent, Cantu manipulated travelers' personal carry-on luggage in an exploratory tactile examination calculated to reveal the private contents of their bags. Unless his conduct is ruled a search, the privacy interests of travelers everywhere—on buses, on trains, on subways, and even on the streets—will be severely compromised. People who put their jackets on a coat rack, their purses on a nearby chair, or their briefcases beside them on a bench, will subject those belongings to random, suspicionless handling by law enforcement officers, intent on discovering hidden items. Preventing this sort of widespread government intrusion into citizens' personal effects was the reason the Fourth Amendment was enacted. To give effect to "the essential rights of a citizen of a Free State,"[15] the Court must rule that Agent Cantu's conduct was a search.

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[15] GALE, BRIEF REMARKS ON SEVERAL LAWS 44.

CONCLUSION

The judgment of the Fifth Circuit Court of Appeals should be reversed and the methamphetamine and Bond's confessions ordered suppressed.

Respectfully submitted.

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In the Supreme Court of the United States

STEVEN DEWAYNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an officer's handling of the exterior of luggage stored in an overhead baggage area of a passenger bus is a "search" within the meaning of the Fourth Amendment.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 36-42) is reported at 167 F.3d 225. The orders of the district court denying petitioner's motion to suppress (J.A. 20-25) and his motion for reconsideration (J.A. 26-28) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1999. The petition for a writ of certiorari was filed on May 10, 1999 (a Monday), and certiorari was granted, limited to question 1 presented by the petition, on October 12, 1999. 120 S. Ct. 320-321. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT

Following a bench trial in the United States District Court for the Western District of Texas, petitioner was convicted of possessing methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and of conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to 57 months of imprisonment, to be followed by three years of supervised release. J.A. 29-32. The court of appeals affirmed. J.A. 36.

1. On July 17, 1997, petitioner was a passenger on a Greyhound bus when it stopped at the permanent Border Patrol checkpoint at Sierra Blanca, Texas. J.A. 20, 36-37. The bus, with about 45 passengers on board, was nearly full. Tr. 25, 67. The passengers' luggage was stored in overhead bins above the seats.[1] Because of the large number of passengers on board the bus, the bins had "a lot" of luggage in them. Tr. 80.

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[1] As the court of appeals noted, the record is unclear as to whether the overhead luggage bins on the bus were of the open or closed type. J.A. 38 n.1. See also J.A. 9.

During the stop, Border Patrol Agent Cesar Cantu boarded the bus and checked the immigration status of the passengers, moving from the front of the bus to the rear. J.A. 20-21, 37. See also J.A. 8. By the time Agent Cantu reached the back of the bus, he was satisfied that all of the passengers were lawfully in the United States. J.A. 9, 37. Because the bus had no rear door, Agent Cantu returned to exit through the front. J.A. 41. See also J.A. 9, 27.

As he walked toward the front of the bus, Agent Cantu "checked the luggage racks above the heads of the seated passengers" and, "on occasion, he * * * felt the suitcases, clothing bags, backpacks or other items contained in the luggage rack." J.A. 21. See also J.A. 27, 37. According to the district court:

> As [Agent Cantu] came to [petitioner's] row, something about a softsided green cloth bag in the overhead compartment attracted his attention. He touched the outside of the bag, and could feel a bricklike object.

J.A. 27. See also J.A. 11, 21. Based on his experience, Agent Cantu suspected that the brick-like object might be a package of narcotics. J.A. 21, 27. See also J.A. 12.

Accordingly, Agent Cantu asked who owned the bag, and petitioner acknowledged that the bag was his. J.A. 21, 27, 37. See also J.A. 13. After a short conversation, petitioner—who seemed nervous—consented to a search of the contents of the bag. *Ibid.* Inside the bag, in the leg of a pair of pants, Agent Cantu discovered a brick of methamphetamine measuring approximately six or seven inches long by four or five inches wide; the brick weighed 1.3 pounds. J.A. 21-22.

After petitioner was advised of his *Miranda* rights, see *Miranda* v. *Arizona*, 384 U.S. 436 (1966), he told

Agent Cantu that he was delivering the methamphetamine from California to Little Rock, Arkansas. J.A. 21-22, 37. Later that same day, petitioner confessed again, this time to a different law enforcement officer. J.A. 22, 24; Tr. 47-49.

2. Petitioner moved to suppress the evidence obtained from his bag and his subsequent statements. The district court held a hearing, at which Agent Cantu and petitioner both testified.

Agent Cantu explained that, as he walked down the aisle of the bus, he squeezed petitioner's green canvas bag and felt a relatively solid, brick-shaped object inside. J.A. 10-11. He described his squeeze of the bag as "hard," but not so hard that it would break anything. *Id.* at 15. Petitioner's testimony did not contradict Agent Cantu's. He stated that, after Agent Cantu "reached for" his bag, Agent Cantu "shook it a little, and squeezed it, and then sniffed it, and then * * * asked me if it was my bag." J.A. 18.

Following the hearing, the district court denied petitioner's motion to suppress. J.A. 20-25. The district court found that Agent Cantu, in the course of making an authorized inspection of the bus and its luggage areas, "felt the outside of [petitioner's] softside green cloth bag" and that "[i]n doing so, he felt the presence of a solid mass reminiscent of a brick." J.A. 23. "It is well settled," the district court concluded, "that the minimally intrusive touching of the exterior of a bag located in the luggage compartment of a common carrier is neither a search nor a seizure within the meaning of the Fourth Amendment." J.A. 23 (citing *United States* v. *Lovell*, 849 F.2d 910 (5th Cir. 1988), and *United States* v. *Garcia*, 849 F.2d 917 (5th Cir. 1988)).[2]

Petitioner filed a motion for reconsideration, which the district court denied. J.A. 26-28. After rejecting petitioner's contention that Agent Cantu's inspection of the luggage racks caused the bus to be stopped for an unreasonable period of time, J.A. 26-27, the district court reiterated that Agent Cantu's "minimally intrusive touching of the exterior of" petitioner's green canvas athletic bag in the overhead luggage compartment "was neither a search nor a seizure within the meaning of the Fourth Amendment." J.A. 28.

Following a bench trial on stipulated facts, petitioner was convicted on both counts charged. J.A. 37, 29-35.

3. Petitioner appealed, and the court of appeals affirmed. J.A. 36-42. The court of appeals first rejected petitioner's claim that Agent Cantu, in touching the exterior of petitioner's luggage, had conducted a "search" within the meaning of the Fourth Amendment. Relying on the principle that "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection," J.A. 38 (quoting *Katz* v. *United States*, 389 U.S. 347, 351 (1967)), the court of appeals concluded that petitioner had knowingly exposed the exterior of his canvas bag to touching by others. Petitioner, the court observed, had stored his gym bag in the overhead luggage bin, a common area of the Greyhound bus, where "it was foreseeable that [it]

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[2] The district court did suppress evidence from a search of the backpack of petitioner's traveling companion and co-defendant, Jason Wiggs. The district court found that Wiggs, unlike petitioner, had been arrested without probable cause before methamphetamine was found in Wiggs's luggage. J.A. 24-25.

would be squeezed, moved, and manipulated by others." J.A. 38. As the court explained:

> On common carriers, passengers often handle and manipulate other passengers' luggage while stowing or retrieving their own luggage. By placing his bag in the overhead bin, [petitioner] knowingly exposed it to the public and, therefore, did not have a reasonable expectation that his bag would not be handled or manipulated by others.

J.A. 38-39 (citing *United States* v. *McDonald*, 100 F.3d 1320, 1327 (7th Cir. 1996), cert. denied, 520 U.S. 1258 (1997); *United States* v. *Guzman*, 75 F.3d 1090, 1095 (6th Cir.), cert. denied, 519 U.S. 906 (1996); *United States* v. *Harvey*, 961 F.2d 1361, 1364 (8th Cir.), cert. denied, 506 U.S. 883 (1992)). Petitioner, the court of appeals further noted, "[c]oncede[d] that other passengers had access to his bag." J.A. 39.

The court of appeals also rejected petitioner's reliance on *United States* v. *Nicholson*, 144 F.3d 632, 639 (10th Cir. 1998). In that case, the Tenth Circuit held that a law enforcement officer's manipulation of luggage stored in an overhead luggage bin constituted a search because the officer's handling of the bag, unlike the handling that might be expected by a fellow passenger, was designed to reveal contraband. See J.A. 40 (characterizing *Nicholson*). For Fourth Amendment purposes, the court of appeals held, it was irrelevant that Agent Cantu's handling of petitioner's bag was calculated to detect contraband. J.A. 40 (citing *California* v. *Ciraolo*, 476 U.S. 207 (1986)).

The court of appeals also rejected petitioner's claim that Agent Cantu discovered the methamphetamine during an unlawful detention of the bus, after the immigration inspection had been completed. J.A. 40-41.

Pointing out that there was "no evidence that Agent Cantu's inspection of the overhead luggage compartment delayed the bus' departure more than an additional one or two minutes," the court concluded that "the trivial delay caused by Agent Cantu's inspection did not violate the strict limits of a border checkpoint stop." J.A. 41.

SUMMARY OF ARGUMENT

I. A Fourth Amendment search occurs when a government official makes observations that infringe on a legitimate expectation of privacy. Such an infringement is shown only when an individual has "manifested a subjective expectation of privacy," and society accepts that privacy expectation "as objectively reasonable." *California* v. *Greenwood*, 486 U.S. 35, 39 (1988). In contrast, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

In this case, Agent Cantu acquired, through the sense of touch, only such information about petitioner's soft-sided bag as was made available to the public. Petitioner chose to transport his relatively large brick of narcotics halfway across the country inside a soft, canvas athletic bag—a bag that had the obvious potential of revealing the presence of solid objects inside when compressed—and then placed that soft bag on the bus's overhead rack, an area accessible to and shared with other passengers on the bus. It is well known that passengers on common carriers and common carrier employees often move, push, compress, and otherwise handle luggage stored in shared areas like overhead racks as they attempt to make room for or remove other bags.

Under those circumstances, petitioner had no reasonable expectation that the brick-like object in his canvas bag—which occupied one third of his bag's length and one third of its width—would remain undetected by the routine handling to which the bag was exposed. Indeed, Agent Cantu noticed the brick merely by squeezing petitioner's soft gym bag, hard but not so hard as to break anything inside, J.A. 10-11, 15, 23, an action the district court described as "minimally intrusive," J.A. 28. It is not a Fourth Amendment search for a law enforcement officer to make the same observations that could have been made by any other passenger or other member of the public handling the bag in a reasonably foreseeable manner.

II. There is no basis for treating Agent Cantu's handling of the bag as a Fourth Amendment search on the theory that his actions were physically intrusive or excessively revealing of the contents of the bag. The intrusion was no more than petitioner could expect from the public. Having exposed his baggage to such handling by a host of others, he cannot claim an unwanted physical invasion when similar action is taken by the police—any more than a store owner who invites the public to shop can complain about similar entry by the police, or the former owner of garbage put out in a can for collection can complain if the can is physically opened and inspected by the police. Once a possession is opened to public inspection, the police may inspect it as well, even if that may involve physical entry. And the fact that tactile inspection of a bag's exterior may reveal information about its contents no more establishes a search than when officers standing on a public sidewalk or in open fields make observations of the contents of a car or a house. Cf. *United States* v. *Dunn*, 480 U.S. 294 (1987) (observation through a window);

Texas v. *Brown*, 460 U.S. 730 (1983) (observation of the interior of a car).

Petitioner is not assisted by the fact that a *Terry* frisk—the touching of a person—is a search. The touching of a bag is quite different from the touching of one's person. Bags may be placed in locations where they are knowingly exposed to public handling and to consequent tactile observation; but it would be a rare case in which a person's body is said to be so exposed.

In any event, the handling of petitioner's bag in this case was not "physically intrusive" or particularly revealing of its contents. Handling a bag does not penetrate the physical barrier that the bag creates between its contents and the rest of the world. And the information that can be learned from such handling extends only to the presence of large and relatively solid items positioned in a way that exposes them to observation by the sense of touch from the outside, *i.e.*, those items anyone handling the bag might have detected.

Finally, Agent Cantu's actions cannot be labeled a search on the theory that they involved a purposeful manipulation in contrast to the sort of "casual" or "incidental" contact that might be expected from other members of the public. The purpose or motive of the officer has no bearing on whether there has been a "search." And once an item is exposed to inspection, this Court has held, officers may make more extensive, more thorough, and more focused observations than would ordinarily be made by members of the public. See *United States* v. *Knotts*, 460 U.S. 276 (1983) (surveillance of movements through public streets for extended period of time); *California* v. *Ciraolo*, 476 U.S. 207 (1986) (focused aerial observation); *Texas* v. *Brown*, *supra* (intentional effort to see inside car by changing position and bending down).

ARGUMENT

AN OFFICER'S TOUCHING OF THE EXTERIOR OF LUGGAGE STORED IN AN OVERHEAD LUGGAGE BIN SHARED WITH OTHER PASSENGERS IS NOT A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT

I. The Handling Of Petitioner's Soft Bag Was Not A Search Because Petitioner Knowingly Exposed It To Public Handling

A. What One Knowingly Exposes To Public Observation Is Not Subject To Fourth Amendment Protection

Not all observations made by police, through sight or through other senses, implicate the Fourth Amendment. 1 Wayne R. LaFave, *Search and Seizure*, § 2.1(a), at 380 (3d ed. 1996). Instead, an officer's observation infringes on a constitutionally protected privacy interest, and constitutes a "search" within the meaning of the Fourth Amendment, only if two conditions are met. First, the individual claiming infringement must have "manifested a subjective expectation of privacy"; second, society must accept that expectation "as objectively reasonable." *California* v. *Greenwood*, 486 U.S. 35, 39 (1988); *California* v. *Ciraolo*, 476 U.S. 207, 211 (1986); *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979).

Consistent with that approach, this Court has long held that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351 (1967); *Ciraolo*, 476 U.S. at 213; *Greenwood*, 486 U.S. at 41. Consequently, this Court has also recognized that law enforcement officers "may see what may be seen 'from a public vantage point'"

without triggering constitutional concerns. *Florida* v. *Riley*, 488 U.S. 445, 449 (1989) (plurality opinion) (quoting *Ciraolo*, 476 U.S. at 213). As this Court explained in *Ciraolo*, 476 U.S. at 213, "the mere fact that an individual has taken measures to restrict some views" does not "preclude an officer's observations from a public vantage point where he has a right to be." See also *Greenwood*, 486 U.S. at 40 (garbage exposed "to the public sufficiently to defeat the[] claim of Fourth Amendment protection"); *United States* v. *Dunn*, 480 U.S. 294, 303-304 (1987) (even if building "could not be entered * * * without a warrant," observation of interior made from outside, while standing in open fields or a public place, not a Fourth Amendment search).

The distinction between matters opened to public observation, and those protected against it, is well established. Over a century ago, in *Ex Parte Jackson*, 96 U.S. 727, 733 (1877), this Court explained that postal inspectors could review the contents of unsealed pamphlets and other open printed materials placed in the mail, and could examine sealed letters and packages "as to their outward form and weight," but held that the Fourth Amendment barred them from opening printed materials "closed against inspection." Fifty years later, the Court employed similar analysis in *United States* v. *Lee*, 274 U.S. 559 (1927), to conclude that using a searchlight to observe contraband on a ship's deck was not a "search" within the meaning of the Fourth Amendment. See *id.* at 561. The contraband, the Court explained, was sitting "on the deck" in public view; the observations were made before the boat was boarded; and there was no "exploration below decks or under hatches." *Id.* at 563. Under those circumstances, "no search on the high seas [was] shown." *Ibid.*

In the seven decades since *Lee*, this Court repeatedly has applied the distinction between items protected against observation and those exposed to public perception. For example, in *United States* v. *Knotts*, 460 U.S. 276, 281 (1983), the Court approved extended police surveillance of a car's movements, using a beeper, because a "person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281. See *United States* v. *Karo*, 486 U.S. 705, 715 (1984) ("The information obtained in *Knotts* was 'voluntarily conveyed to anyone who wanted to look.'"). The Court likewise has unanimously held that the police may use a flashlight to examine a car's interior through the window, because there is no reasonable privacy expectation in areas "which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers." *Texas* v. *Brown*, 460 U.S. 730, 740 (1983) (plurality opinion); *id.* at 746 (Powell, J., concurring) (contraband concededly "observed in the course of a lawful inspection"); *id.* at 750 (Stevens, J., concurring) ("I agree that the police officer invaded no privacy interest in order to see the balloon."). And the Court has held that the police may constitutionally look through garbage left for pickup in a closed container outside the home, because the garbage is "exposed * * * to the public sufficiently to defeat the[] claim to Fourth Amendment protection." *Greenwood*, 486 U.S. at 40.

Even with respect to the home and its curtilage—the areas for which constitutional protection is at its apogee—this Court consistently has held that police observation from publicly accessible vantage points does not constitute a Fourth Amendment search. See *Riley*, 488 U.S. at 449 ("[T]he home and its curtilage are not necessarily protected from inspection that involves

no physical invasion.") (plurality opinion). In *Ciraolo*, *supra*, for example, the officers used an airplane to view the backyard of a house where two tall fences prevented ground-level observation. See 476 U.S. at 209, 211. Even on the assumption that the defendant's backyard was subject to the same protection as the home itself, the Court explained, air travel is now a familiar part of modern life, and "any member of the" flying public "who glanced down could have seen everything that these officers observed." *Id.* at 213-214. The Court thus "readily" concluded that the defendant's "expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor." *Ibid.* See also *Riley*, 488 U.S. at 450-451 (plurality opinion) (although occupant "intended and expected that his greenhouse would not be open to public inspection," expectation not reasonable because any "member of the public could legally have been flying over" and seen inside); *id.* at 453 (O'Connor, J., concurring); *Minnesota* v. *Carter*, 525 U.S. 83, 104-105 (1998) (Breyer, J., concurring) (officer's observation of apartment from public vantage point, whether through "gaps" in blinds or blinds "pulled the 'wrong way,'" not an unreasonable search); *Smith* v. *Maryland*, 442 U.S. at 742 (no reasonable expectation of privacy in telephone numbers dialed because that information is conveyed to a third party).

B. Luggage Placed In Overhead Racks Is Knowingly Exposed To Public Handling And The Observations That Can Be Made Through Such Handling

1. The foregoing principles control this case. Petitioner chose to transport his relatively large brick of narcotics halfway across the country inside a soft, canvas athletic bag, and chose to place that soft bag on

the bus's overhead rack, an area accessible to and shared with other passengers on the bus. It is common knowledge, born of "mundane observation," *People* v. *Santana*, 73 Cal. Rptr. 2d 886, 888 (Ct. App. 1998), that passengers on common carriers and common carrier employees often handle—sometimes roughly—luggage stored in shared areas. "Any person who has travelled on a common carrier knows that luggage placed in an overhead compartment is always at the mercy of all people who want to rearrange or move previously placed luggage in order to squeeze additional luggage into the compartment or remove previously placed luggage." *United States* v. *McDonald*, 100 F.3d 1320, 1327 (7th Cir. 1996), cert. denied, 520 U.S. 1258 (1997). Indeed, other passengers or bus line employees may handle stowed bags in myriad ways—they might grab them from any number of angles while removing them from the rack; compress or squeeze them by pushing on them with the palms of their hands in an effort to make room for additional luggage; or pat them and press them against other bags to make them fit or ensure that they are snug in the rack. Thus, once a defendant places his luggage in "an overhead rack on a common carrier * * * accessible to other passengers, and where other passengers also stow[] their luggage":

> It is likely that in retrieving or stowing their own bags, other passengers * * * would have to move, touch, or push [the defendant's] bags, and would in all probability feel the outside of [his] bags in doing so. [Such a person] can thus be said to have knowingly and voluntarily exposed the *exterior* of [his] bags to being physically touched by other persons. In other words, [the defendant cannot] have a reasonable expectation of privacy that the exterior of [his] luggage would not be felt, handled, or manipulated by others.

Id. at 1326. See J.A. 38-39 (it is "foreseeable that" bags in overhead rack "would be squeezed, moved and manipulated by others," because "passengers often handle and manipulate other passengers' luggage, while stowing or retrieving their own").

The correctness of those observations is confirmed by experience. Even a quick glance through contemporary travel accounts reveals acute public awareness that luggage stowed in shared compartments on common carriers is regularly handled, compressed, pushed, and shoved—even crammed or pounded—by other passengers and by common carrier employees seeking to make room for or retrieve other bags, or to ensure that all bags are secure in the rack.[3] And rough handling of

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[3] See, *e.g.*, T. Massingill, *Decade of Prosperity Means More Fliers, More Complaints*, Knight-Ridder Tribune Bus. News, Mar. 28, 1999 (United Airlines spokesman notes that "hundreds of passengers have to cram, recram and then remove their bulky carry-on bags"); J. Flinn, *Confessions of a Once-Only Carry-On Guy*, S.F. Examiner, Sept. 6, 1998, at T2 (reporting that the flight attendant "rearranged the contents of three different overhead compartments to free up some room, and together we lifted, shoved and pounded until my bag squeezed in."); *Carry-on Troubles*, Kan. City Star, June 1, 1999, at B6 ("overhead bins are filled to the brim," and the "flight crews help[] passengers cram the bins full, smashing everything else that is safely in place."); M. Eagen, *Familiar Anger Takes Flight With Airline Tussles*, Boston Herald, Aug. 15, 1999, at 8 ("It's dog-eat-dog trying to cram half your home into overhead compartments."); G. Withiam, *About Those Carryons*, Cornell Hotel & Rest. Admin. Q., Feb. 1, 1998, at 6 (late-arriving passengers "attempt[] to find space in the overhead compartment, crushing your carefully stowed bag in the process"); Rocky Mountain News Television broadcast, *United's New Carry-on Rule Takes Off* (May 16, 1998) ("Take this bag and

luggage during long-haul travel is not a modern phenomenon, but has been documented in travel literature from ages past.[4] For that very reason, travelers

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shove it—or squeeze it, or fold it—whatever it takes to get it in that overhead bin."); G. Barker, *Internet Crosstalk at Issue: Carry-on Bags for Air Travelers*, The Fort Worth Star-Telegram, Nov. 23, 1997, at 4 (People "try to jam [their possessions] into the overhead storage, crushing everything that someone else has put there."); A. Knowles, *Get the Complete Picture*, Datamation, Oct. 1, 1997, at 74 (reporting typical trip in which the traveler "discover[s] that [his] overhead compartment is full" but "stuff[s] [his] luggage into it anyway"). See also S. Bennett, *Airing Out Miles and Miles of Aggravations When Flying*, Pittsburgh Post-Gazette, Feb. 3, 1999, at S5; D. Field, *Passengers' Horror Stories Illustrate Airlines' Ills*, USA Today, Dec. 14, 1999, at 12B; *Oh, What A Carry On: Might It Be Time for Airlines to Restrict Both Luggage and Children on Planes?*, The Economist, Dec. 18, 1999.

[4] One travel account from the late nineteenth century warns that anyone planning to visit the United States should "provide himself with such a strong portmanteau as will resist the notorious 'baggage-smashers,' with a smaller one for use on the rail." Samuel Reynolds Hole, *A Little Tour In America* 18 (1895) (1971 reprint). Travel by stage coach was more brutal still, for luggage and passenger alike. Any luggage that could not be fastened to the exterior was placed on the floor of the coach, resulting in constant collisions between the luggage and travelers as the stage coach lurched over the rough roads. See, *e.g.*, 2 John Bernard, *Retrospections of America 1797-1811*, at 33-34 (1887) (*quoted in* Oliver W. Holmes & Peter T. Rohrbach, *Stagecoach East* 42 (1983)) ("[T]he floor was lumbered with a mail-bag and * * * earthen and hardware jugs * * * and other articles * * * which had the effect before the vehicle was ten minutes in motion, of dyeing our shins all the colours of the rainbow."); 2 John M. Duncan, *Travels Through Part of the United States and Canada in 1818 and 1819*, at 6 (1821-1822) (*quoted in* Holmes & Rohrbach, *supra*, at 42) ("The heavier kinds of boxes and trunks are fastened behind, upon the frame of the carriage, but the smaller articles and the mail bag are huddled under the seats in the inside, to the great annoyance of the passengers, who are frequently forced to sit with their knees up to

concerned about such handling—and the consequences of soft bags being grabbed, compressed or squashed—have long had the option of using hard luggage. See Deborah Shinn et al., *Bon Voyage: Designs for Travel* 16, 18, 21, 23, 25, 27, 29, 52 (1986) (photographs and drawings of hard-sided carrying containers and other hard luggage used in ancient Egypt and the 14th through the 18th centuries). See also note 4, *supra*.

Consistent with those observations, federal courts have agreed that a passenger who leaves his bag in a publicly accessible part of a common carrier, like an overhead rack, knowingly exposes it to at least some degree of public touching, feeling, handling, and movement—and that, as a result, police handling of such luggage does not necessarily constitute a "search" within the meaning of the Fourth Amendment. See, *e.g.*, *McDonald*, 100 F.3d at 1325 ("[W]e agree with other courts of appeal that have held that the reasonable expectation of privacy inherent in the contents of luggage is not compromised by a police officer's physical touching of the exterior of luggage left exposed in the overhead rack of a bus."); *United States* v. *Guzman*, 75 F.3d 1090, 1095 (6th Cir.) ("[D]efendant had no reasonable expectation of privacy in the exterior of his bag when it was on the open luggage rack of a commercial bus."), cert. denied, 519 U.S. 906 (1996); *United States* v. *Harvey*, 961 F.2d 1361, 1364 (8th Cir.) (Because "[i]t is not uncommon for the bus driver or a fellow passenger to rearrange the baggage in the overhead compartment or to temporarily remove the baggage and place it in a seat or in the aisle in order to rearrange and

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their mouths, or with their feet insinuated between two trunks, where they are most lovingly compressed whenever the vehicle makes a lurch into a rut.").

maximize the use of limited compartment space," passengers "have no objective, reasonable expectation that their baggage will never be moved once placed in an overhead compartment."), cert. denied, 506 U.S. 883 (1992);[5] cf. *United States* v. *Garcia*, 849 F.2d 917, 919 (5th Cir. 1988) ("The agents' handling of Garcia's bag was certainly no rougher than could be expected in an airport baggage handling context."); *United States* v. *Bronstein*, 521 F.2d 459, 465 (2d Cir. 1975) (Mansfield, J., concurring) ("It is common knowledge that luggage turned over to a public carrier will be handled by many persons who, although not permitted to open it without the owner's permission, may feel it, weigh it, check its locks, straps and seams to insure that it will not fall apart in transit, and shake it to determine whether the

[5] Even those few decisions that have suppressed evidence discovered from the handling of luggage left in shared parts of a common carrier agree with the general principle that police handling of soft luggage is not necessarily a search. *Nicholson*, 144 F.3d at 637 ("The circuits uniformly agree that an officer's touching of a bag's exterior does not necessarily constitute a search."). As the Tenth Circuit explained in *Nicholson*:

> To be sure, placing a bag in an overhead rack of a commercial bus exposes it to certain intrusions. Seeking to make room for their own articles, other passengers may push and move the bag. Therefore, Defendant had no reasonable expectation that his carry-on would not be touched * * * .

144 F.3d at 639. See also *United States* v. *Gwinn*, 191 F.3d 874, 878 (8th Cir. 1999) ("Of course, not every intrusion with an individual's luggage constitutes a search within the meaning of the Fourth Amendment."); *United States* v. *Gault*, 92 F.3d 990, 992 (10th Cir.) (No search occurred where the information the DEA Agent "obtained from the kick and lift of the bag, its weight and the solidity of its contents, was the same information that a passenger would have obtained by kicking the bag accidentally or by lifting it to clear the aisle."), cert. denied, 519 U.S. 939 (1996).

contents are fragile or dangerous."), cert. denied, 424 U.S. 918 (1976). The decisions of state courts are in accord.[6]

[6] See, *e.g.*, *State* v. *Lancellotti*, 595 N.W.2d 558, 563 (Neb. Ct. App. 1999) ("[P]assengers who place their luggage in the overhead public storage on a commercial carrier can reasonably expect that other passengers will touch, move, or adjust the luggage in order to retrieve or make room for their own luggage."); *State* v. *Quintanilla*, No. A-99-201, 1999 WL 1063085 (Neb. Ct. App. Aug. 11, 1999) (concluding that police handling and feeling of luggage in an overhead rack is not an illegal search). See also *Stanberry* v. *State*, 684 A.2d 823, 832 (Md. 1996) (although the defendant may have "reduced his expectation of privacy by placing his bag on the overhead luggage rack," that reduction did not extend to having his bag opened); cf. *Sprowls* v. *State*, 433 So. 2d 1271, 1271-1272 (Fla. Dist. Ct. App. 1983) (officer's "prepping" bag for dog sniff by "press[ing] his hands against [its] sides, forcing air from within to be expelled" not "a search and seizure" within meaning of State or federal constitution); *People* v. *Burns*, 540 N.Y.S.2d 157, 161, 162 (Sup. Ct. 1989) (because "[w]hat is a reasonable expectation * * * varies with locale," officer's momentary grasp of nylon bag bumped against him in crowded area "not a search in Fourth Amendment terms"), aff'd, 582 N.Y.S.2d 234 (App. Div.), appeal denied, 600 N.E.2d 652 (1992); *Santana*, 73 Cal. Rptr. at 889 ("[W]hen luggage is checked, it is unavoidably subject to manipulation, handling, and compression. * * * That in any given case [the] bag [is] dropped to the ground, pushed hard against other bags or squeezed by an officer is of no constitutional significance."); *Scott* v. *State*, 927 P.2d 1066, 1068 (Okla. Crim. App. 1996) ("Once a bag is released into the custody of the busline by checking it," the owner has "no reasonable expectation that the bag will not be moved or handled."); *State* v. *Peters*, 941 P.2d 228, 232 (Ariz. 1997) (because "luggage turned over to a public carrier will be handled by many persons who, although not permitted to open it * * * , may feel it * * * and shake it," agent's squeezing of checked bag does not violate Fourth Amendment if "neither violent nor extreme"); *State* v. *Millan*, 916 P.2d 1114, 1117 (Ariz. Ct. App. 1996) (similar).

2. Petitioner concedes that, when he placed his soft canvas gym bag in the overhead rack of the bus, he exposed it to public touching and handling. See Pet. Br. 18 (petitioner "may even have expected that other bus passengers would * * * push[] or move[]" his bag "as they stored their own luggage"); J.A. 39 (noting similar concession). Consequently, petitioner could have no legitimate expectation that his soft gym bag would remain untouched and the presence of the brick-like object inside undetected. Any other passenger or bus line employee pushing, compressing, or grabbing petitioner's gym bag (while rearranging stowed bags, making room for other bags, retrieving bags, or ensuring stowed materials are secure in the overhead rack) could have sensed through its soft canvas exterior the same thing that Agent Cantu noted—that there was a hard, brick-like object inside. As one treatise has explained, once "it is conceded that the defendant had 'no reasonable expectation that his luggage would not be moved or handled'" by others, an officer's act of "squeez[ing] a piece of soft-sided luggage and [thereby feeling] the unmistakable outline of a gun" or other contraband does "not constitute a search." 1 LaFave, *supra*, § 2.2(a), at 404-405 (footnotes omitted); cf. *United States* v. *Russell*, 670 F.2d 323, 325 (D.C. Cir.) (gun held to be in "plain view" where officer "felt the outline of the gun" as he lawfully "grasped the paper bag" in which the gun was sitting), cert. denied, 457 U.S. 1108 (1982).

Indeed, given the size of the methamphetamine brick, it is unlikely that anyone handling the bag (including Agent Cantu) might have missed it. Agent Cantu merely squeezed petitioner's bag ("hard" but not so hard as to break anything inside) and in so doing felt a brick-shaped object inside the bag. J.A. 10-11, 15.

See J.A. 27 (district court finding that Agent Cantu "touched the outside of the bag, and could feel a brick-like object."). The brick, which weighed one-and-one-third pounds, occupied one third of the bag's length and one third of its width.[7] As a result, the district court found that Agent Cantu noticed the brick-like object when he "felt the outside of [petitioner's] softside green cloth bag," J.A. 23, an action that was "minimally intrusive." J.A. 28.[8] Because Agent Cantu felt that which anyone else handling the bag might have perceived, his observations did not invade an expectation of privacy that society considers reasonable.

3. Petitioner's claimed expectation of privacy in this case is far less justified than the privacy expectations this Court has rejected as unreasonable in the past. In *Ciraolo* and *Riley*, for example, the defendants took reasonable precautions to protect the areas behind their homes from visual observation, erecting tall enclosures; to protect those areas from the aerial visual observation that occurred would have required extraordinary measures. See *Riley*, 488 U.S. at 454 (O'Connor,

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[7] Agent Cantu testified that the bag was about a foot and half long, a foot high, and a foot wide, more or less. J.A. 12. The brick of methamphetamine was six or seven inches long, and four or five inches wide. J.A. 21.

[8] While Amicus NACDL argues (Br. 7) that the brick was shielded from observation because it was "wrapped" inside a pair of pants, the district court found only that the brick was found "[i]nside *the leg* of a pair of pants." J.A. 21 (emphasis added). Common sense suggests that placing a brick inside a pant leg does not make it any less obvious that it is brick. For similar reasons, NACDL's reliance (Br. 7) on the duct tape that surrounded the brick is misplaced. Duct tape does not disguise the presence of a brick-like object. Instead, together with cellophane or some other wrapping material, it holds the narcotics together in the shape of a brick.

J., concurring) (to preserve privacy against aerial observation would "require individuals to completely cover and enclose their curtilage" and force them "entirely [to] giv[e] up their enjoyment of those areas."). And in *Greenwood*, the defendants had no way to protect their garbage from being observed once it was placed out for pick up. *Greenwood*, 486 U.S. at 55 (Brennan, J., dissenting).

Here, in contrast, petitioner did not employ even ordinary precautions. Nothing prevented petitioner from transporting his narcotics in a hard briefcase, hard luggage, or a cardboard carton, each of which would have protected it from tactile detection during routine handling of baggage. See pp. 16-17, *supra*. But petitioner chose not to do so. Instead, he chose to put his brick of narcotics in a soft gym bag and the gym bag in a shared location where others would touch, push, move, and handle it. When, as here, an individual fails to employ the "precautions customarily taken by those seeking privacy," *Rakas* v. *Illinois*, 439 U.S. 128, 152 (1978) (Powell, J., concurring), he "cannot reasonably expect privacy from public observation." *Riley*, 488 U.S. at 454 (O'Connor, J., concurring).

II. Feeling The Exterior Of Luggage Left Open To Public Touching Is Not A "Search" Of Its Contents

Relying on *Terry* v. *Ohio* and other frisk cases, petitioner argues that Agent Cantu's handling of his luggage must be a search because it was physically intrusive, revealed information about the bag's contents, and exceeded the sort of "casual" or "incidental" contact that petitioner claims to have expected of other passengers. None of those arguments is persuasive.

A. Handling The Exterior Of Luggage Exposed To Public Contact Does Not Violate Reasonable Privacy Expectations

1. As petitioner notes (Br. 7-8), luggage is an "effect" traditionally protected under the Fourth Amendment. But effects, no less than homes or any other form of property, may be observed by the police if they are exposed to public inspection. And petitioner exposed his soft bag to public touching and handling here. See pp. 13-22, *supra*. Petitioner contends that the contact with the exterior of his luggage was physically intrusive, Pet. Br. 10-12, and unduly revealing of the bag's contents, *id.* at 12-15. But even where the particular form of observation or inspection can properly be characterized as "physically intrusive" or revealing, a defendant cannot claim invasion of a reasonable privacy expectation if he has knowingly exposed his property to such consequences. Thus, for example, while police entry into a business is surely "physically intrusive," the owner of a business open to the public cannot complain when government agents enter during normal hours. See, *e.g.*, *Maryland* v. *Macon*, 472 U.S. 463, 469 (1985) ("[R]espondent did not have any reasonable expectation of privacy in areas of the store where the public was invited to enter."). Likewise, an inspection of garbage left out at the curb—which may consist of opening sealed bags and rummaging through them—is "physically intrusive." But the police may conduct such observations where the garbage, because it is left out for collection, is exposed to the public. See *Greenwood*, 486 U.S. at 37-38, 40. See also *Katz*, 389 U.S. at 353 ("[T]he reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.").

For the same reason, it makes no difference that Agent Cantu's observations from the outside of the bag may have revealed limited information about what was inside. Pet. Br. 12-15. So too might looking into a house or car through an exposed window, *Dunn*, 480 U.S. at 304 (even if barn enjoyed Fourth Amendment protection, police could peer into it from open fields); *Texas* v. *Brown*, 460 U.S. at 740 (police observation of car's interior not a search because area could be "viewed from outside the vehicle by either inquisitive passersby or diligent police officers"); or observing an enclosed garden or greenhouse from the air, *Ciraolo*, *supra*; *Riley*, *supra*. None of those observations constitutes a search, because each is limited to matters that the defendant knowingly exposed to view or perusal by total strangers or other members of the public. And even though petitioner shielded the items in his gym bag from visual observation by enclosing them in an opaque container, he exposed the rough outlines of some items to tactile observation when he placed his soft-sided bag in a publicly accessible location where others could be expected to handle it. *Cf. Ciraolo*, 476 U.S. at 213 ("[T]he mere fact that an individual has taken measures to restrict some views" does not "preclude an officer's observations from a public vantage point.").

2. Petitioner is mistaken to rely on the fact that a *Terry*-frisk of a person, see *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Minnesota* v. *Dickerson*, 508 U.S. 366, 378-379 (1993), or the act of lifting up a stereo component in an apartment to see its serial numbers, *Arizona* v. *Hicks*, 480 U.S. 321, 324-325 (1987), can be characterized as a "search" within the meaning of the Fourth Amendment. See Pet. Br. 9-11. In neither *Terry*, nor *Dickerson*, nor *Hicks* was there (nor could there be) any contention

that the defendant had knowingly exposed his person or his possessions to the handling and observations that took place.

In fact, *Dickerson* and *Hicks* are both applications of the rule that "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" *Hicks*, 480 U.S. at 325 (quoting *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978)). In *Dickerson*, for example, the police lawfully stopped respondent and conducted a warrantless frisk of his person for weapons pursuant to the rule established in *Terry* v. *Ohio*, *supra*. During the course of the frisk, the police explored a lump in the defendant's pocket *after* having determined that the defendant was not armed. The Court held such further exploration to be unlawful. Because the warrantless intrusion authorized by *Terry* "must be strictly limited to that which is necessary for the discovery of weapons," the Court explained, a "protective search [that] goes beyond what is necessary to determine if the suspect is armed" is not "valid under *Terry* and its fruits will be suppressed." *Dickerson*, 508 U.S. at 336-337. Thus, *Dickerson* addresses whether and when an officer oversteps the limited search authorized under *Terry*. It does not address whether an officer's observation of matters knowingly exposed to public perception constitutes a search in the first instance.

Arizona v. *Hicks*, *supra*, is inapt for the same reason. There, the police entered the defendant's apartment, based on exigent circumstances, to search for a suspect who had just fired a shot through the apartment floor and injured the occupant of the apartment below. 480 U.S. at 323. During the search, an officer lifted up a stereo component and noted the serial numbers on it; the component was then identified as stolen. *Ibid.* The Court held that, because lifting the component was

"unrelated to the objectives of the authorized intrusion" —catching the shooter—and "produce[d] a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry," it was unlawful. *Id.* at 325. *Hicks* thus did not involve an instance of knowing exposure. Instead, it concerned the scope of a permissible search of matters otherwise hidden from public perception.[9]

Petitioner argues that, because *Terry* frisks of a person's *body*, *i.e.*, "a careful tactile exploration of the clothing on the suspect's body," are searches, any touching of *effects* also must constitute a search. Pet. Br. 14 ("'persons' receive no more protection * * * than the 'effects.'"). The differences in the items being touched, however, significantly affects application of the principle that governmental observation is a "search" only if it intrudes on a privacy expectation that society accepts as reasonable. See pp. 10-13, *supra*. Society has always accorded tremendous respect to each individual's privacy expectation that his person will not be subjected to uninvited touching. See *Terry*, 392 U.S. at 17 (frisk of person's clothing is "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment"). But that same solicitude does not extend to the

[9] Petitioner's reliance on early accounts regarding searches of "travelers' portmanteaus and saddlebags," Pet. Br. 8 n.7, is likewise misplaced, because those reports do not address knowing exposure. Compare note 4, *supra* (discussing early travel). The "searches" discussed in those materials appear to have been what everyone would agree is a Fourth Amendment search—a process by which the luggage is opened and its contents visually inspected. See Benjamin Gale, *Brief Remarks on Several Laws* 44 (1782); William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 1518-1519 (1990).

handling or touching of bags and other containers checked with carriers or placed in common locations where they predictably will be touched, moved, and handled by others. Cf. *State* v. *Millan*, 916 P.2d at 1118 ("*Dickerson* involved police intrusions upon the person during a pat-down search while this case involves intrusions upon [luggage] relinquished to the possession of a third person in a public place. The former implicates privacy rights that the latter does not.").[10] Thus, while society generally respects every person's expectation that he will not be subject to rough grabbing or handling in most circumstances, it is both commonplace and accepted that luggage left in publicly accessible places shared with other passengers will be handled in ways that would be intolerable if directed at a person.

For similar reasons, Amicus NACDL is incorrect (Br. 13) to suggest that principles drawn from assault and battery cases support petitioner's position. This Court repeatedly has recognized that property and tort principles are at most "marginally relevant to the question of whether the Fourth Amendment has been violated." *Karo*, 468 U.S. at 713. See also *Silverman* v. *United States*, 365 U.S. 505, 511 (1961) (scope of Fourth Amendment not defined by the "ancient niceties of tort or real property law"). The NACDL's cases, moreover,

[10] Indeed, the quality of luggage is often promoted based on its ability to withstand such treatment. Perhaps the most famous example is American Tourister's so-called "Gorilla ad," which ran for fifteen years and was recently revived in revised form. The advertisement, in obvious reference to the rough treatment bags often receive, featured an ape hurling and beating an American Tourister suitcase, without causing perceptible damage. See Barbara Vancheri, *Perfect Pitches*, Pittsburgh Post-Gazette, June 30, 1999, at E1.

all recognize the longstanding distinction between an unconsented and offensive touching directed at the *person* (and matters, like the clothing worn, on the person) and such touching when directed at chattels or luggage. The former can be an assault or battery. The latter can be neither. See William L. Prosser & W. Page Keeton, *The Law of Torts* § 9, at 39-40 (5th ed. 1984); *Cole* v. *Turner*, 90 Eng. Rep. 958 (1705) ("[T]he least touching *of another* in anger is a battery.") (emphasis added).[11] Thus, none of the cases NACDL cites would have been actionable if the touching, rather than being directed at the person or an object intimately connected with the person, had been directed at chattels left in a shared and public location.[12]

---

[11] It is highly questionable whether the Founders would have considered the mere unconsented touching of the exterior of a bag left in a publicly accessible location, absent injury to the bag or its contents, to be any sort of tort at all. Traditional tort actions protecting personal property, like trespass to chattel, required proof of meaningful interference with the owner's *possessory* interests. Prosser & Keeton, *supra*, § 14, at 85 (cases involving "carrying off" of, or damage to, chattel); Restatement (Second) of Torts § 218 (1965) (limiting liability for trespass to actions that "dispossess" another of chattel, impair the chattel, deprive the possessor of the chattel's use "for a substantial time" or cause bodily harm to the possessor).

[12] In *Fisher* v. *Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967), for example, the waiter did not merely "remove a plate from the table," NACDL Br. 13, but rather "forceful[ly] dispossess[ed]" the plaintiff of a plate, yanking it from his hand, 424 S.W.2d at 630; NACDL Br. 13. The court expressly recognized that, absent contact with either the plaintiff's body or an object in his hand, there would have been no assault or battery. See 424 S.W.2d at 629-630. Similarly, in *Jung-Leonczynska* v. *Steup*, 803 P.2d 1358 (Wyo. 1990), the defendant did not merely pound on the plaintiff's desk, but struck a book that was in or touching the plaintiff's hand; it was only because of that connection to the plaintiff's person that the suit was actionable. See 803 P.2d 1363 (dissenting opinion). The remaining cases cited by NACDL likewise all involved contact with people or objects on their person or in their grasp. See, *e.g.*, *Fields* v. *Cummins Employees Fed. Credit Union*, 540 N.E.2d 631, 640 (Ind. Ct. App. 1989) (proof of battery requires a harmful or offensive "contact with a person," and proof of assault requires an act that "creates an apprehension of" such "a harmful or offensive contact").

3. Petitioner, moreover, is incorrect to characterize the handling of a bag's exterior as "physically intrusive," Pet. Br. 10-12, or to argue that it reveals intimate details concerning the bag's contents, *id.* at 12-15.

Petitioner's claim of "physical intrusion" confuses the examination of the *exterior* of a bag with a search of its contents. When an officer touches the outside of a bag, he does not open it; he does not place his hands inside of it; and he does not "rummag[e] through [its] contents." See *United States* v. *Place*, 462 U.S. 696, 707 (1983) (noting that canine sniff does not involve opening luggage); *Ex Parte Jackson*, 96 U.S. at 733 ("Letters and sealed packages * * * in the mail are" not protected "from examination and inspection" as to "their outward form and weight."). At no time does he pierce the physical barrier the bag creates, and is intended to create, between the public and the bag's contents. Consequently, such an observation is not "physically intrusive" for constitutional purposes—as this Court's pre-*Katz* search-and-seizure cases readily attest. Compare *Goldman* v. *United States*, 316 U.S. 129 (1942) (where listening was accomplished by placing a device *against* a common wall without penetrating it, observations not a search) with *Silverman*, 365 U.S. at 509 (where listening "accomplished by means of an unau-

thorized physical penetration," observations amounted to a search).[13]

Nor does examining the exterior of a bag tend to reveal intimate details about its contents. Very few items have signature shapes that can be discerned from handling the exterior of a bag. As one state court has observed, "[i]t is difficult to imagine any contents of ordinary luggage that could be identified by feeling its exterior, except" large and solid objects like "marijuana packed in bricks, large amounts of powdered drugs, and guns." *State* v. *Quintanilla*, No. A-99-201, 1999 WL 1063085, at *6 (Neb. Ct. App. Aug. 11, 1999). Consequently, an officer's handling of a bag in general will "tell police very little about the contents, other than

[13] Indeed, before this Court's decision in *Katz* v. *United States*, 389 U.S. 347 (and its adoption of the "reasonable expectation of privacy" formula from Justice Harlan's concurring opinion in that case, *id.* at 360), the Court generally required a physical trespass as a precondition to finding a Fourth Amendment search. See *Olmstead* v. *United States*, 277 U.S. 438, 457 (1928); *Goldman*, 316 U.S. at 135. The Court reassessed that approach, and largely abandoned it in favor of the "reasonable expectations" test, in light of technological advances that might otherwise have eroded the privacy the Fourth Amendment was designed to protect. See *Ciraolo*, 476 U.S. at 214 (abandonment of trespass test and adoption of reasonable expectation test prompted by "observations about future electronic developments and the potential for electronic interference with private communications"). In this case, however, the government did not make its observations through technological means that could not have been anticipated by the Founders or even 19th century courts. Rather, it made the same observations that could have been made using techniques available since the dawn of travel. Where an individual does not even make the minimal effort needed to prevent a form of observation that has been known for centuries, it is hard to say his expectation of privacy is reasonable. See pp. 21-22, *supra* (individual must take "customary" precautions to preserve privacy).

drugs, in the luggage." *Ibid.* Moreover, when law enforcement officers pat, squeeze, grab, or compress luggage, they do not and cannot discern or explore intimate details about the bag's contents. Nor can they somehow "feel" their way "through the [bag's] various contents" from outside. Pet. Br. 13. Rather, contact with the outside of the bag permits them to sense only the presence, general shape, and hardness of relatively large and solid objects inside, and even then only if the objects are situated in a manner that exposes them to perception from outside the bag. The presence of such an object is not an intimate fact, and in any event is precisely what anyone else grabbing, compressing, or pushing on the bag during foreseeable handling might sense.

Passengers handling bags in a manner similar to the manner of Agent Cantu may not pay attention to what they sense, or know how to interpret it. But nothing bars government officers from using specialized knowledge to keep themselves alert to, and to help them interpret, that which any other member of the public might have sensed. See *Ciraolo*, 476 U.S. at 213 ("That the * * * officers were trained to recognize marijuana is irrelevant.").[14] Instead, so long as what government

[14] Cf. *Place*, 462 U.S. at 707 (dog sniff of luggage not a search). Although the Court in *Place* did not rely on the principle that what an individual knowingly exposes to the public is not protected by the Fourth Amendment, several lower courts, both federal and state, have relied on *Place* together with this principle to approve the limited touching that is required to prepare luggage for a canine sniff. See *McDonald*, 100 F.3d at 1326 n.7 ("Because the Supreme Court has approved the canine sniff, it follows that the Court would also likely approve some degree of police handling and manipulation of personal luggage in order to make the luggage accessible to the police dog."). See also *United States* v. *Lovell*, 849

agents sense could have been sensed by any other member of the public, no Fourth Amendment search has occurred. In this case, nothing in the record suggests that, when Agent Cantu touched or squeezed petitioner's bag, he sensed anything about its contents other than the fact that it had a relatively solid, large, brick-like object inside of it—information that could have been noted by anyone else handling the bag.[15]

B. Officers Are Not Limited To "Casual" Or "Incidental" Observations Of Matters Exposed To Their Senses

Petitioner also argues that, even though his gym bag was exposed to public touching, Agent Cantu's handling of it still must be considered a search. In particular, he contends that Cantu handled the "luggage in a manner calculated to reveal its contents," and did not restrict himself to the sort of "casual contact" that petitioner claims to have expected from fellow passengers. Pet. Br. 20. Petitioner thus seems to suggest that an officer violates the Fourth Amendment if he handles luggage

F.2d at 913; *United States* v. *Viera*, 644 F.2d 509, 510 (5th Cir.), cert. denied, 454 U.S. 867 (1981); *State* v. *Killean*, 907 P.2d 550, 555 (Ariz. Ct. App. 1995), vacated on other grounds, 915 P.2d 1225 (1996); *Lancelotti*, 595 N.W.2d at 563.

[15] Petitioner's emphasis on what might be "capable" of observation rather than on what was actually observed also ignores this Court's teachings that a Fourth Amendment inquiry must focus on what actually occurred in the case at hand, not on what might occur in some future case. See *Dow Chemical Co.* v. *United States*, 476 U.S. 227, 239 n.5 (1986) ("Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations."); *United States* v. *Karo*, 468 U.S. 705, 712 (1984) ("[W]e have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment.").

placed in the overhead rack for the purpose of identifying contraband, or if he has more than "casual" or "incidental" contact with it. See also NACDL Br. 13-14.(only "incidental, harmless, or accidental touching is to be expected and * * * tolerated"). That proposed standard has no basis in this Court's cases; would be unworkable; and would not render the handling of the bag at issue here unlawful in any event.

1. To the extent petitioner's test turns on the fact that Agent Cantu touched the bag for the *purpose* of detecting narcotics, it is inconsistent with this Court's precedents. Indeed, at the same time petitioner repeatedly finds fault with any touching of the exterior of a bag that is "*calculated* to determine whether it contained drugs,"[16] he properly concedes that the purpose or reason for the agent's contact with the bag is irrelevant. Pet. Br. 14 ("subjective intent" does not determine "whether a Fourth Amendment search has occurred."). As this Court has explained, the fact that "police observation * * * was directed specifically at the identification" of contraband—even contraband inside a protected place—is "irrelevant." *Dunn*, 480 U.S. at 304-305. See *Ciraolo*, 476 U.S. at 212 (rejecting

[16] Pet. Br. 7 (emphasis added); Pet. Br. 9, 13 (touch unlawful if "aimed at" and "calculated to reveal items with a size, shape, density, or other characteristics" suggestive of narcotics); Pet. Br. 12-13 (handling a search if conducted "in an attempt to find drugs"); Pet. Br. 20 (bag touched "in a manner calculated to reveal its contents"). That error is duplicated by the cases on which petitioner relies. See *Gwinn*, 191 F.3d at 879 (The "traveling public would not expect their luggage * * * to be subject to a *calculated* and thorough squeezing.") (emphasis added); *Nicholson*, 144 F.3d at 639 ("tactile examination *aimed at discovering* the nature of the contents of the bag" violated defendant's "reasonable expectation of privacy in the bag") (emphasis added).

respondent's challenge to "the authority of government to observe his activity from any vantage point or place if the viewing is motivated by a law enforcement purpose, and not the result of a casual, accidental observation."); *Whren* v. *United States*, 517 U.S. 806, 813 (1996) (Court consistently "unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.").

Petitioner is also incorrect to argue that the handling of luggage exceeds constitutional bounds unless limited to the sort of "casual" or "incidental" handling petitioner claims to have expected from other passengers. As an initial matter, it is far from clear that the handling of luggage by other passengers is strictly "casual" and wholly unintrusive. As noted above, it is well known that passengers and common carrier employees often have substantial (and sometimes forceful) contact with stowed luggage. See pp. 13-19, *supra*. More fundamentally, whether or not an officer's observations constitute a search has never depended on whether the officer's manner of making the observation was the sort of "casual," "incidental," or "fleeting" observation expected from the general public. Instead, so long as the matter the officer observes is open to public perception, the officer may observe that matter carefully and closely, even if the public generally would not be as observant or take such advantage of the exposure.

Thus, in *United States* v. *Lee*, *supra*, this Court did not ask whether the boatswain's observation of contraband in open view on the ship's deck was different or more thorough than the observation expected of other members of the public, even though the boatswain used a search light. Likewise, in *Texas* v. *Brown*, *supra*, the Court did not ask whether the police officer's conduct, which consisted of shining a flashlight in the car

window, "chang[ing] [his] position," and "ben[ding] down at an angle so [he] could see what was inside," 460 U.S. at 740 (plurality opinion), exceeded the sort of casual observations expected of other passersby. Instead, because "[t]he general public could peer into the interior of" the automobile "from any number of angles," nothing barred the officer from peering into it from any, or all, of those angles as well. *Ibid.*; *id.* at 746, 750 (concurring opinions). And in *Ciraolo*, this Court rejected the defendant's and the dissent's contention that the officers' aerial observations were "searches" because, rather than limiting themselves to the "casual, accidental observation," 476 U.S. at 212, or "fleeting, anonymous, and nondiscriminating glimpse," that most members of the flying public would obtain, *id.* at 223 (dissenting opinion), the officers focused on the defendant's yard with the purpose of identifying marijuana. Instead, the Court held, the fact that the yard was knowingly exposed to observation from above rendered the asserted privacy expectation unreasonable. 476 U.S. at 213, 214 n.2.

Petitioner's contention that police officers are limited to making the same "casual" observations expected of members of the public is also at odds with this Court's decision in *United States* v. *Knotts*, *supra*. In *Knotts*, the police not only followed the defendant's car as it proceeded through public streets, but used a beeper (which was installed in a drum of chemicals sold to him) and a helicopter to do so. 460 U.S. at 278. Even though no one ordinarily expects others to observe their every movement for such an extended period of time—at most, they expect to be observed, casually and incidentally, by different people, in different places, at differ-

ent times[17]—this Court held that the police could make such observations because the defendant had "voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination." 460 U.S. at 281-282. In other words, because any member of the public could have observed any of defendant's conduct, the police were entitled to observe all of it.

The same analysis applies to an officer's use of his other senses, including touch. Just as an officer may make a visual observation from several different angles open to the rest of the public, see *Brown*, 460 U.S. at 740, so too may he touch a bag at different points or in distinct ways, so long as the bag was knowingly exposed to each. And just as an officer's visual observation is not converted into a search just because the officer looks more carefully than might a member of the public, *ibid.*; *Ciraolo*, 476 U.S. at 212 n.1, 213, so too an officer's "feel" of a publicly exposed soft bag does not become a search simply because it is more focused, calculated, or extensive than the public's ordinarily would be. Instead, when each observation the officer makes —each squeeze, pat, or grab of the bag—reveals only that which any other passenger might have sensed during foreseeable handling of the bag, the officer's observations do not infringe on a constitutionally protected privacy interest.

2. Petitioner claims support for his proposed rule—that officers are limited to the sort of "casual contact" allegedly expected from other members of the public—

[17] Indeed, extended observations, if conducted by ordinary members of the public, might be condemned as stalking or harassment.

from *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979). See Pet. Br. 29-30. As an initial matter, *Lo-Ji Sales* involved the search and seizure of potentially expressive materials, presumptively protected by the First Amendment, from an adult bookstore. That fact alone distinguishes it. As the Court recognized in *Lo-Ji Sales* itself, 442 U.S. at 326 n.5; accord *Macon*, 472 U.S. at 468 (citing *Lo-Ji Sales*), the First Amendment "imposes special constraints on searches for and seizures of material arguably protected by the First Amendment." No materials even arguably protected by the First Amendment are at issue here.

In any event, *Lo-Ji Sales* was not a case in which law enforcement officers merely observed publicly exposed materials more closely, more extensively, or less casually than allegedly expected of the public. Instead, the officers there opened and viewed matters that were closed to public observation. For example, the officers there unwrapped, and reviewed the contents of, magazines that had been "encased in clear plastic or cellophane wrappers" and thus that had their contents sealed against public inspection. See 442 U.S. at 323. Likewise the officers insisted on viewing films that, absent a payment the officers did not make, were also closed to public observation. *Id.* at 322-323, 328. Thus, far from limiting officers to touching or handling materials in the precise or "casual" manner expected of other customers, *Lo- Ji Sales* merely precludes officers from opening and viewing matters closed to public inspection. See also *Ex Parte Jackson*, 96 U.S. at 733 (same rule for sealed packages placed in the mail); contrast *Macon*, 472 U.S. at 469 (undercover officers may purchase and view the materials they pay for, as might other customers).

Finally, to the extent petitioner (Br 10-11) construes *Dickerson*, 508 U.S. at 378, and *Arizona* v. *Hicks*, 480 U.S. at 324- 325, as limiting officers to "casual" observations, those cases too are inapposite. As explained above, see pp. 24-26, *supra*, those cases were both applications of the rule that warrantless searches must be strictly confined to the exigency that gives rise to them. Neither involved the question here, which is whether an officer's observation of matters exposed to the *public*—*i.e.* matters that any other passenger handling the baggage might have observed—constitutes a "search" within the meaning of the Fourth Amendment.

3. Petitioner's proposed standard is also unworkable. Under it, an officer would be permitted to handle bags in overhead racks just as other passengers might, and would be required to terminate contact at the point that an ordinary passenger would. The extent and manner in which passengers and carrier employees might handle stowed bags in individual circumstances, however, may well depend on a host of subtle and potentially random factors unsuited for application by officers in the field.[18] The standard, moreover, would make for inconsistent decisions. Not only might one person's foreseeable handling be another's unexpected manipulation, but results might turn on nuances of language, as courts attempt to differentiate unconstitu-

[18] For example, one might speculate that, in an uncrowded bus with ample overhead space, passengers would expect only limited and relatively light handling of their bags, whereas a crowded bus with smaller bins might yield more, and more aggressive, handling. The acceptable scope of an officer's conduct surely should not depend on such subtleties. See *Whren*, 517 U.S. at 815 ("We cannot accept that the search and seizure protections of the Fourth Amendment are so variable, and can be made to turn upon such trivialities.") (citations omitted).

tional "manipulation" from mere pressing, grabbing, squeezing, or pushing that corresponds to foreseeable handling. Indeed, even though the Tenth Circuit adopted petitioner's proposed test just a year ago, its decisions already portend inconsistent results.[19]

C. Officer Cantu's Handling Of Petitioner's Gym Bag Did Not Meaningfully Differ From Reasonably Foreseeable Handling

Petitioner, in any event, overstates any differences between Agent Cantu's handling of his bag and that which might be expected of any other passenger. At the hearing, Agent Cantu testified that, when he "felt" a green bag as he exited the bus, he noted a brick-like object in it. J.A. 10. He further testified that, when he squeezes bags, he squeezes them "hard," but not so hard as to break anything. J.A. 15. Petitioner did not

[19] For example, the Tenth Circuit in *Nicholson* cited with approval Fifth Circuit decisions which upheld handling described as "a light press of the hands along the outside of a suitcase," *Viera*, 644 F.2d at 510, and the feeling of the sides of the bags followed by compressing to force air out, *Lovell*, 849 F.2d at 915. At the same time, however, it suppressed evidence seized from a checked bag because the agent felt "its sides with his hands perpendicular to the ground and flat." *Nicholson*, 144 F.3d at 640. See also *United States* v. *Gault*, 92 F.3d at 992 (no search where officer both "kick[ed] and lift[ed]" bag to determine "its weight"). The differences among those forms of handling are far from obvious. Indeed, sometimes the Tenth Circuit has relied on distinctions that surely do not make a difference. Thus, it attempted to reconcile its decision in *Nicholson* with the Seventh Circuit's decision in *McDonald* by noting that, in *McDonald*, "the court thrice repeated that the officer did not remove defendant's bag from the overhead rack during his initial contact with it." 144 F.3d at 638. Yet in *Nicholson* itself, the court suppressed evidence from a checked bag that was touched without being removed from the cargo hold. See 144 F.3d at 640.

offer any greater detail. He testified only that Agent Cantu "reached for [his] bag, and he shook it a little, and squeezed it, and then sniffed it." J.A. 18. Based on that testimony, the district court found only that Agent Cantu "felt the outside of [petitioner's] softside green cloth bag," J.A. 23, and characterized that action as a "minimally intrusive touching," J.A. 28.

Combining Agent Cantu's description of what he did with what that permitted him to feel (the presence of a relatively hard brick-like object, J.A. 10-11, with edges, J.A. 12, that was covered in a lighter layer, J.A. 11), petitioner attempts to paint a picture of extensive contact between Agent Cantu and the bag. See Pet. Br. 3, 18-19 (describing it as "manipulation" and "squeezing and feeling"). But neither the record nor the district court's findings support that picture. Agent Cantu apears to have "felt" the bag once, apparently through a squeeze, and thereby discerned the brick-like object and the characteristics he described. See pp. 20-21 & note 8, *supra*. But even if one were to assume that the "feel" and the "squeeze" were separate actions, they hardly exceed the sort of grabbing, pressing, squeezing, or pushing one might expect of other passengers or common carrier employees as they remove, replace, or rearrange previously stowed luggage to make room for or retrieve other bags. See pp. 13-19, *supra*. Because Agent Cantu's handling of petitioner's bag in this case did not reveal, or permit observation of, anything that could not have been observed by anyone else handling the bag, it violated no constitutionally protected privacy expectation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

STEVEN DEWAYNE BOND,
Petitioner,
v.
UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Steven Bond, an interstate traveler, carried his canvas bag onto a Greyhound bus and placed it in the overhead bin directly above his seat. He contends that Border Patrol Agent Cantu searched that bag by manipulating it to determine its contents. The Government responds that this manipulation was not a search. It argues that Bond exposed his bag to public touching and handling when he placed it in the overhead bin, thus surrendering all expectations of privacy against manipulation of that bag.

The Government is wrong. No traveler exposes his luggage to public handling by placing it in the overhead bin of a Greyhound bus. To the contrary, a passenger carries luggage on board to limit those who may have contact with it, and the type of contact they may have. As an accommodation to fellow travelers, a bus passenger might tolerate their casual contact with his luggage—perhaps some pushing or movement of it to make room for another bag. However, no traveler would reasonably expect—or permit—a fellow passenger to investigate the contents of luggage by feeling and squeezing it as the government agent did in this case. Agent Cantu did what no other passenger would have been expected or permitted to do. He invaded Bond's reasonable expectation of privacy in his luggage and its contents, and thus conducted a search within the meaning of the Fourth Amendment.

ARGUMENT

I. BOND HAD A REASONABLE EXPECTATION OF PRIVACY AGAINST A TACTILE EXAMINATION OF HIS CARRY-ON LUGGAGE.

The Government's argument presents a deceptively simple syllogism: Bond exposed his bag to handling by

the public; Agent Cantu did no more than a member of the public could; therefore Agent Cantu's conduct was not a search. Each premise of this syllogistic argument is based on false assumptions.

Underlying the first premise is the assumption that placing luggage in the overhead bin of a Greyhound bus makes it accessible to the public. But a bus's interior is not subject to unrestricted public access. It is shared space; not space open to the public generally. The Government also assumes that privacy expectations in carry-on luggage are no greater than in luggage checked with an airline—an assumption that dismisses the importance of individuals' common-law rights in their personal property and ignores the reasonable expectations of travelers in civil society.

The second Government premise, equally invalid, is that Agent Cantu's actions were like those that would reasonably be expected from a fellow passenger. It rests on the assumption that Agent Cantu's manipulation of Bond's luggage was not physically intrusive, and relies on an interpretation of the factual record that creates a picture of Cantu's actions as being less intrusive than they actually were.

The conclusion that the Government draws is even less plausible than the premises it assumes. The Government concludes that touching the exterior of a bag to discern hidden objects is not a search. In two Fourth Amendment cases, this Court has rejected an analogous argument, finding that touching the exterior of clothing, to detect weapons or contraband, does constitute a search. The Government tries to distinguish these cases by arguing, among other things, that they involve searches of persons, not effects. The Government's argument misconstrues those cases.

A. Neither Bond Nor Any Other Bus Traveler Exposes His Carry-On Luggage to "Public Touching" by Placing It in an Overhead Bin.

Contrary to the Government's claim, Bond does not concede that he "exposed [his bag] to public touching and handling" by placing it in the overhead bin of a Greyhound bus. Gov't Br. 20 (citing Bond Br. 18). Bond does acknowledge that other passengers might have been expected to have casual contact with his bag, by pushing or moving it. Bond Br. 18. The Government's conflation of these distinct concepts—the expectation of some limited physical contact from fellow passengers and general exposure to "public touching and handling"—provides the foundation for its argument that Bond exposed his luggage to the public.

Stowing luggage in the overhead bin above one's seat is not equivalent to publicly exposing that luggage, for two reasons. First, there is no general right of public access to the interior of interstate buses, or to the luggage passengers have stored in overhead bins. Second, a passenger's decision to carry his bag on board the bus, and keep it nearby, limits the type of "handling" reasonably expected from other passengers.

1. There was no general right of public access to Bond's bag.

"It is privacy that is protected by the Fourth Amendment, not solitude." *O'Connor v. Ortega*, 480 U.S 709, 730 (1987) (Scalia, J., concurring). Consequently, the Fourth Amendment provides protection to places and things even though they are shared by a number of persons. For example, society recognizes an expectation of privacy against public or governmental intrusion into the home, even though family members share the home with one another and with visitors, and even though a landlord may have the right to conduct unannounced inspections at any time. *See id.; see also Payton v. New York*, 445

U.S. 573 (1980). Society likewise recognizes a person's expectation of privacy against public or governmental intrusion into his office, even though he may share that office with others. *See Mancusi v. DeForte*, 392 U.S. 364, 369 (1968) (expectation of privacy against police intrusion into office shared with other employees); *cf. Ortega*, 480 U.S. at 717 (plurality opinion) (employee retains expectation of privacy against police intrusion into office, even though supervisor has access to office). These cases demonstrate that shared access is not always public access.

A commercial bus carrying interstate passengers is another example of shared, but not public, access. Ordinarily, only ticketed passengers are permitted on board. Those without a ticket cannot enter; if they manage to, they would surely be asked to leave. Each passenger shares bin space with fellow passengers, but the public is not invited in to browse among the bins, squeezing and feeling luggage as they please.

Because the Government overlooks these basic limitations on the public accessibility of a Greyhound bus, it attempts a seriously flawed analogy to cases involving police "observations from . . . public vantage point[s] where [they] had a right to be." Gov't Br. 11, 13-22. This Court has held that such observations are not searches within the meaning of the Fourth Amendment. *See, e.g., California v. Ciraolo*, 476 U.S. 207, 213 (1986). However, the inside of an interstate bus is nothing like navigable public airspace,[1] public streets,[2] open fields,[3] or the

[1] *Ciraolo*, 476 U.S. at 213 (visual observation from "public navigable airspace"); *Florida v. Riley*, 488 U.S. 445, 449-50 (1989) (plurality opinion) (same).

[2] *Texas v. Brown*, 460 U.S. 730, 733 (1983) (on street); *United States v. Knotts*, 460 U.S. 276, 281 (1983) (on "public streets and highways"); *see also California v. Greenwood*, 486 U.S. 35, 37, 39 (1988) (garbage left on street outside curtilage of home).

[3] *United States v. Dunn*, 480 U.S. 294, 303-04 (1987).

high seas[4]—the public places and thoroughfares involved in cases relied upon by the Government. Gov't Br. 10-13.

Even if the bus interior were publicly accessible, Agent Cantu's "observations" were not made from that "vantage point." Cantu's presence on the bus did not reveal the contents of Bond's bag; Cantu "observed" the bag's contents by reaching into the bin, placing his hands on the bag, and manipulating it. *Cf. Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (under plain-view analysis, officer's "vantage point" for "tactile discoveries of contraband" is "suspect's outer clothing"). Thus, the agent's tactile "observations" were made through the surface of Bond's personal luggage—a place that bears no resemblance to a public street or the public airways.[5] When Agent Cantu's hands were on Bond's bag, he was not occupying a place "where he ha[d] a right to be." Gov't Br. 11 (quoting *Ciraolo*, 476 U.S. at 213). That Bond may have been prepared to tolerate other passengers' incidental or casual contact with his bag did not create a right of public access to his bag that was even remotely similar to the public's right to be present on public thoroughfares.

The Government cites one "observation" case that does not involve a public thoroughfare or other public place,

[4] *United States v. Lee*, 274 U.S. 559, 562-63 (1927).

[5] In any event, the physical intrusiveness of Agent Cantu's "observations" fundamentally differentiate them from the purely visual observations made in the cases on which the Government relies. *See, e.g., Ciraolo*, 476 U.S. at 213 (approving observations from public airspace made "in a physically nonintrusive manner"); *Riley*, 488 U.S. at 451-52 (noting no evidence that aircraft caused "undue noise . . . wind . . . [or] dust, or threat of injury"). See also Part I.B., *infra*. *Greenwood* is the only public thoroughfare case that involved more than just visual observations. 486 U.S. at 37-38. *Greenwood*, however, is particularly inapposite because it involved garbage discarded by its former owner. Luggage containing one's personal effects, and placed in an overhead bin for safekeeping, is not like garbage placed on a public street to be taken away and destroyed.

Ex Parte Jackson, 96 U.S. 727, 733 (1877). See Gov't Br. 11, 29, 37. *Jackson*, however, dealt with property that a defendant has let out of his control by placing it in the U.S. mail. *Id.* at 732.[6] Because Bond carried his bag on board the bus, thus keeping it within his control, *Jackson* is inapposite.

2. *By carrying his bag on board the Greyhound bus and placing it directly above his seat, Bond preserved an expectation of privacy against a tactile examination of his luggage.*

Bond's decision to carry his bag on board the bus, and keep it close by, signified a greater expectation of privacy in the bag than the privacy expectation for checked luggage. The Government's public exposure argument ignores the difference between these privacy expectations. It also ignores travelers' common-law rights in, and privacy expectations as to, their carry-on luggage.

Quoting a leading treatise, the Government argues that a search does not occur when a law enforcement officer squeezes luggage, if its owner "had 'no reasonable expectation that his luggage would not be moved or handled' by others." Gov't Br. 20 (quoting 1 WAYNE A. LAFAVE, SEARCH AND SEIZURE § 2.2(a), at 404-05 (3d ed. 1996)). This quotation addresses the reasonable expectation of a traveler who checks his luggage with an airline. *See id.*[7] The Government's reliance on it is seriously misplaced, since Professor LaFave holds a very different view of the privacy expectations of bus travelers who carry their luggage on board. In those circumstances, LaFave accepts the principle that the Government asks this Court to reject: A traveler who places a carry-on bag in an overhead bin retains a reasonable expectation of privacy against a tactile examination of that luggage. *See* 1 LAFAVE, *supra*, § 2.2(a), at 52 (Supp. 2000).

LaFave acknowledges that a passenger who places carry-on luggage in an overhead bin may expose it to certain minor intrusions, such as other passengers' pushing or moving the bag. *See id.* (citing *United States v. Nicholson*, 144 F.3d 632, 639 (10th Cir. 1998)). But he rejects the idea that the passenger exposes it to more intrusive "manipulations which 'reveal the contents of a bag[.]'" *Id.* (quoting *Nicholson*, 144 F.3d at 639). LaFave goes on to explain that, "as the *Nicholson* court properly concluded," manipulation that reveals the contents of a bag "'depart[s] from the type of handling [which] a commercial bus passenger would reasonably expect his baggage to be subjected.'" 1 LAFAVE, *supra*, § 2.2(a), at 52 (Supp. 2000) (quoting *Nicholson*, 144 F.3d at 639)).

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[6] Even as to mail, the Court said that "[l]etters and sealed packages" are free from inspection "except as to their outward form and weight." 96 U.S. at 733. The outward appearance of mailed matter is, of course, open to view; its weight is a special concern of the postal service, which is permitted to determine whether "there is an excess of weight over the amount prescribed." *Id.* at 736. *Jackson* gave no hint whether mail could be lawfully inspected by manipulation. It did, however, illustrate what was meant by the term "exposed": "officers can act" when "the object is exposed, and shows unmistakably that it is prohibited, as in the case of an obscene picture or print." *Id.* at 735-36. In the Court's understanding, "exposed" meant open to view.

[7] Many of the cases relied upon by the Government involved checked luggage. See *People v. Santana*, 73 Cal. Rptr. 2d 886, 888 (Cal. Ct. App. 1998) (luggage checked with airline); *United States v. Garcia*, 849 F.2d 917 (5th Cir. 1988) (same); *United States v. Bronstein*, 521 F.2d 459, 460 (2d Cir. 1975) (same); *Sprowls v. State*, 433 So.2d 1271, 1271-72 (Fla. Dist. Ct. App. 1983) (same); *State v. Peters*, 941 P.2d 228, 229 (Ariz. 1997) (same); *State v. Millan*, 916 P.2d 1114, 1115-16 (Ariz. Ct. App. 1996) (same); *Scott v. State*, 927 P.2d 1066, 1067 (Okla. Crim. App. 1996) (luggage checked with bus company). Most also involve travel by air—a type of travel where reasonable expectations of privacy more readily give way to government intrusion because of heightened security concerns. *See Santana*, 73 Cal. Rptr. at 888 (noting heightened security for travel by air).

Bond, like Nicholson, carried his bag onto a bus. Bond did not check his luggage, and he did not otherwise place his bag within the reach of the public generally.[8] Instead, he took the precaution of keeping his luggage with him as he traveled. He put his bag directly above his seat on the bus, where he could protect it.[9] In so doing, Bond preserved his reasonable expectation of privacy against a tactile examination of his luggage.

A reasonable expectation of privacy is "one which has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.' " *Minnesota v. Carter*, 119 S. Ct. 469, 472 (1998) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)); *see also United States v. Jacobsen*, 466 U.S. 109, 122

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[8] Even checking one's belongings does not always surrender expectations against a tactile examination. For example, a shopper who checks his bag with a grocery store clerk retains a Fourth Amendment expectation of privacy against police manipulation of that bag to determine its contents. *See United States v. Most*, 876 F.2d 191, 197-98 (D.C. Cir. 1989). That is so because "an individual need not shut himself off from the world in order to retain his fourth amendment rights." *Id.* at 198; *see also* 1 LAFAVE, *supra*, § 2.2(a), at 405 (citing *Most* as example of when police "touching *would* be a search") (emphasis in original).

[9] The Government criticizes Bond because, by carrying a soft-sided bag, he failed to "employ even ordinary precautions" to protect his privacy interests in the contents of his luggage. Gov't Br. 21-22. That argument ignores the fact that Bond carried his bag onto the bus and kept it close by, a traveler's basic—and arguably best—precaution to insure the privacy of his luggage. Indeed, travelers routinely take this precaution to preserve their personal effects. *See* Gerry Barker, *Internet Crosstalk at Issue: Carry-On Bags for Air Travelers*, FORT WORTH STAR-TELEGRAM, Nov. 23, 1997, at 4 ("When I fly, I carry on a briefcase with magazines and books that I want to read and mark. Then I want a small bag with something not left to bag handlers."). Contrary to the Government's claim (Gov't Br. 22), Bond employed those precautions customarily taken by travelers seeking privacy in the contents of their luggage.

n.22 (1984). In this case, both these sources support Bond's privacy expectations in his bag.[10]

Bond's expectation of privacy in his luggage derived from well-established concepts in property law and tort law. Because Bond's bag was his personal property, the law guaranteed him the right to exclude others from touching it. *See Rakas*, 439 U.S. at 143 n.12 (a principal right "attaching to property is the right to exclude others").[11] Tort law afforded Bond additional "legal protection" in preserving his "interest in the mere inviolability" of his personal property; he had a "privilege to use reasonable force to protect his possession against even harmless interference." RESTATEMENT (SECOND) OF TORTS § 218 cmt. e (1965); 75 AM. JUR. 2D *Trespass* § 17 (1991)

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[10] The Government asserts that, under this Court's precedent, "property and tort principles are at most 'marginally relevant to the question of whether the Fourth Amendment has been violated.' " Gov't Br. 27 (quoting *United States v. Karo*, 468 U.S. 705, 713 (1984)). This misreads "the message" of this Court's precedent, which is simply that "property rights are not the sole measure of Fourth Amendment violations." *Soldal v. Cook County, Ill.*, 506 U.S. 56, 64 (1992); *cf. Minnesota v. Carter*, 119 S. Ct. 469, 475 (1998) (Scalia & Thomas, JJ., concurring) ("early American law of . . . trespass . . . underl[ies] the Fourth Amendment"). The message is similar for tort concepts; although not determinative, they are instructive in defining reasonable expectations of privacy. *See* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1368-69 (noting relationship between tort privacy and Fourth Amendment privacy). The "right to be let alone" is a basic tort concept. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). It is also the essence of the Fourth Amendment. *Winston v. Lee*, 470 U.S. 753, 758 (1985) (Fourth Amendment protects "right to be let alone").

[11] The right of a property owner to exclude others has been recognized since before the Fourth Amendment was drafted. Blackstone characterized "the right of property" as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES 2 (Dawsons of Pall Mall 1966).

(same).[12] Bond did not forfeit these fundamental rights by carrying his bag onto the bus, and placing it in the overhead bin directly above his seat. To the contrary, he acted to protect it from the intermeddling of others—intermeddling such as a tactile examination of the bag to discern its contents.

The rights afforded to travelers by property law and tort law accord with societal expectations. A traveler expects that his fellow passengers may store their luggage in a shared bin, and may touch or move his luggage to do so. Perhaps bus employees may also have some minimal contact with it. Passengers or employees who do more, however, exceed the bounds of what society considers reasonable, and invade travelers' privacy. *See* John Lang, *Air Rage on the Rise as Passengers Stuff Jets with Carry-Ons,* SEATTLE POST-INTELLIGENCER, Dec. 17, 1998, at A14 (results of "trying to fit more and larger bags into limited space. . . . are flaring tempers [and] fist fights").[13]

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[12] Whether or not Agent Cantu's manipulation of Bond's bag would support a legal action for damages, see Gov't Br. 28 & n.11, it clearly constituted the tort of trespass to chattel. *See United States v. Hernandez,* 353 F.2d 624, 626 (9th Cir. 1965) (squeezing luggage is trespass to chattel). The tort of "trespass to chattel may be committed by intentionally . . . using or intermeddling with a chattel in possession of another." RESTATEMENT (SECOND) OF TORTS § 217(b). "'Intermeddling' means intentionally bringing about a physical contact with the chattel," something Cantu did when he manipulated Bond's luggage. *Id.* at § 217 cmt. e. Bond's bag was in his possession because he retained control of it while it was above him in the luggage bin. *See* RESTATEMENT (SECOND) OF TORTS § 216. Although damages are unavailable unless one is dispossessed of property, or the chattel is impaired, "legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by the privilege to use reasonable force to protect his possession against even harmless interference." *Id.* at § 218 cmt. e. A similar privilege of self-help, or "recaption," was recognized early in the common law. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES 4-5.

[13] One article cited by the Government (Gov't Br. 15 n.3) opines that the impolite airline passenger who "attempts to find space in the overhead compartment" by "crushing [another's] carefully stowed bag," is a "[t]raveler's nightmare." Glenn Withiam, *About Those Carryons,* CORNELL HOTEL & REST. ADMIN. Q., Feb. 1, 1998, at 6. Such treatment is simply not what we expect when travelling. What travelers reasonably expect from others is common courtesy. As a New York Times article suggests, travelers should practice "bin etiquette. Minimal rearranging is permitted if done with care. Stacking is also allowed, as long as lighter objects—coats, small shopping bags—are placed on heavier sturdier bags. If you are planning major reconstruction, ask the permission of the person whose bags you plan to move." Adam Bryant, *Practical Traveler, Minding Manners at 32,000 Feet,* NEW YORK TIMES, June 25, 1995, sec. 5, at 5.

Both property law and tort law protect against such private intrusions; when the intrusion is by the government, the Fourth Amendment applies. Any passenger who manipulated Bond's luggage in a manner calculated to reveal its contents would violate Bond's reasonable privacy expectations. When Agent Cantu did so, he violated the Fourth Amendment.

B. Agent Cantu's Physically Intrusive and Revealing Tactile Examination of Bond's Bag Exceeded What Bond Would Reasonably Have Expected from Other Passengers.

The Government argues that Cantu's manipulation of Bond's bag did not "meaningfully differ from reasonably foreseeable handling" by other passengers. Gov't Br. 39-40. The Government is incorrect. Bus passengers, seeking to make room for their own luggage, may be expected to move or push the luggage of their fellow passengers. They are not expected, however, to engage in an exploratory tactile examination of that luggage, as Cantu did in this case. By his own admission, Cantu manipulated Bond's bag, squeezing and feeling it in a manner calculated to reval its contents. Passengers do not examine the contents of each other's luggage by squeezing or feeling it in a physically intrusive manner that reveals those contents. Any passenger who manipulated luggage, seeking to discover its contents, would be thought a thief.

The Government attempts to minimize Cantu's manipulation of Bond's bag, asserting that "Agent Cantu appears to have 'felt' [Bond's] bag once, apparently through a squeeze, and thereby discerned the brick-like object and the characteristics he described." Gov't Br. 40. This assertion is contradicted by Cantu's own testimony, as well as that of Bond and his companion, Wiggs.

At the suppression hearing, Cantu testified "I felt a green bag that I could feel a brick-like object in it." (J.A 10.) After several more questions, Cantu elaborated that what he felt was a "[b]rick-like object . . . that *when squeezed*, you could feel an outline of something of a different mass inside of it." (J.A. 11 (emphasis added).) Both the sequence of Cantu's narrative and the details he provided demonstrate that he first felt, and then squeezed, Bond's luggage. Bond and Wiggs confirmed Cantu's account. Bond testified that Agent Cantu "reached for my bag, and he shook it a little, and squeezed it, and then sniffed it[.]" (J.A. 18.) Wiggs testified that Cantu "grabbed Mr. Bond's bag, shook it around, squeezed it, pulled it forward, and sniffed it[.]" (Tr. 71.)[14]

Whether or not Agent Cantu's manipulation was a continuous action or separate acts, it is clear that his tactile examination of Bond's bag was more physically intrusive than the casual or incidental pushing or moving that may reasonably be expected from other passengers.[15]

[14] The district court made no specific findings whether Cantu's manipulation was one continuous action or not. The court found only that Cantu "felt" and "could feel" a brick-like object in Bond's bag, and that Cantu had "touched" the bag. (J.A. 21, 23, 27.) The court of appeals was somewhat more specific, noting that Cantu inspected bus passengers' luggage by "feeling and squeezing" it. (J.A. 37.) When Cantu reached the luggage compartment over Bond's seat, he "squeezed" the bag—a "manipulation" that "was calculated to detect contraband." (J.A. 37, 40.)

[15] The Government errs when it argues that Cantu's manipulation of Bond's luggage was "not 'physically intrusive' for constitutional purposes" because there was no physical penetration of the bag. Gov't Br. 29. The requirement of physical penetration was explicitly rejected in *Katz v. United States*, 389 U.S. 347, 352-53 (1967). After *Katz*, this Court has found a Fourth Amendment search when the physical intrusion fell far short of penetration. *See, e.g., Minnesota v. Dickerson*, 508 U.S. 366, 378-79 (1993) (manipulating outside of pocket, without penetrating pocket, was "search"); *Terry v. Ohio*, 392 U.S. 1, 16-17 (1968) (touching "surfaces" of clothing without penetrating barrier of "outer garments" was search).

It was also more revealing of the bag's contents. Cantu's squeezing permitted him to "feel the edges of [a] brick" of methamphetamine. (J.A. 12.) That brick, according to Cantu—and contrary to the Government's claim—was "wrapped inside a pair of pants."[16] (J.A. 14.) It was also heavily wrapped in duct tape until it became "an oval mass." (J.A. 14; Tr. 53).[17] And it was then placed inside a closed canvas bag.[18] Despite these protections, Cantu's "hard" squeezing of the canvas bag enabled him to feel the edges of the brick.[19] (J.A. 12, 15.) Squeezing

[16] Citing the district court's opinion, the Government disputes Amicus NACDL's statement that the brick was "wrapped" in the pants, noting that the "court found only that the brick was found '[i]nside *the leg* of a pair of pants.'" Gov't Br. 21 n.8 (quoting J.A. 21 (emphasis added by Government)). Of course, that the brick might have been inside the pant leg is not inconsistent with it also being "wrapped" in the pants, which was Agent Cantu's undisputed testimony. (J.A. 14.)

[17] The Government argues that the brick was simply "covered in a lighter layer." Gov't Br. 40. That cannot be correct. To disguise the edges of a rectangular brick by covering it in duct tape, until it feels oval, requires that the brick be heavily wrapped, not lightly layered.

[18] Canvas itself is a sturdy material—a "strong unbleached cloth of hemp, flax, or other coarse yarn, used for sails, tents, [and] painting[s]." 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 330 (1993).

[19] The Government characterizes the squeeze as hard, "but not so hard as to break anything." Gov't Br. 39 (citing J.A. 15). Cantu did not say his squeeze was not so hard as to break anything; rather, he claimed that, during his luggage inspections, he hadn't broken anything "yet." (J.A. 15.)

the oval mass that was in Bond's luggage, Cantu could "feel the outline of something of different mass inside of it." (J.A. 11.) No bus passenger, pushing or moving another's luggage to make room for his own, would engage in the manipulation necessary to gather this amount of detailed information.[20] It was not Cantu's expertise or experience—but the intrusiveness of his manipulation—that revealed these details.

These details were private and protected. The Government appears to argue that no search occurs unless an officer's manipulation tends to reveal "intimate details" about the contents of luggage. Gov't Br. 30. But there is no such requirement. The Fourth Amendment protects not just "intimate" matters, but any matter that a person has a right to keep private. Thus, when serial numbers on a stereo component were revealed, as in *Arizona v. Hicks*, no "intimate" facts were discovered; yet this Court held that a search occurred. 480 U.S. 321, 324-25 (1987). "A search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Id.* at 325.

In any event, it is manifestly untrue that "[v]ery few items have signature shapes that can be discerned from handling the exterior of a bag." Gov't Br. 30. A hair

[20] In support of its argument that the methamphetamine brick was so large that "it is unlikely anyone handling the bag (including Agent Cantu) might have missed" it, the Government compares only two dimensions of the brick and the bag. Gov't Br. 20-21. The Government argues that the "brick, which weighed one-and-one-third pounds, occupied one third of the bag's length and one third of its width." Gov't Br. 21. This does not mean the brick occupied one third of the bag's volume. According to Agent Cantu, the bag was 18 inches long by 12 inches square (J.A. 12), which would yield 2,592 cubic inches of volume. While the record does not reveal the third dimension of the brick, it was approximately 6 inches long by 4 inches wide (J.A. 21). For the brick to "occupy" one third of the bag's volume, it would have to be about 36 inches high —an impossibility given the bag's dimensions.

dryer, a toothbrush, a book, shoes, eyeglasses, medicine bottles, and many other personal items have shapes that can readily be identified by an officer's manipulation of a bag. *See Illinois v. Wardlow*, 120 S. Ct. 673, 675 (2000) (officer's "squeeze" of bag identified gun); *cf. Dickerson*, 508 U.S. at 369 (rock of crack cocaine wrapped in cellophane identified through tactile examination).

Agent Cantu's manipulation of Bond's bag was an exploratory tactile examination. His methods were calculated to reveal the contents of the bag. It was not Cantu's subjective purpose that determined whether a Fourth Amendment search occurred, but the means he used to achieve that purpose. See Bond Br. 14. The manipulation necessary to discover the contraband concealed in Bond's luggage was probing, intrusive, and revealing—not the type of manipulation a bus traveler reasonably expects from his fellow passengers.

C. Touching the Exterior of a Bag to Discern Hidden Objects Is a Search.

This Court has found that a search occurs when an officer engages in a tactile examination of an exterior surface to discover hidden objects. *Dickerson*, 508 U.S. at 378-79 (feeling exterior of jacket pocket to investigate contents was search); *Terry*, 392 U.S. at 16 (pat-down of outer clothing for weapons was search). Thus, the Government is wrong when it argues that Bond "confuses the examination of the *exterior* of a bag with a search of its contents." Gov't Br. 29 (emphasis in original). In principle, both *Dickerson* and *Terry* have rejected that conclusion.

The Government seeks to distinguish *Dickerson* and *Terry* by arguing that they involved the search of a person, which implicates heightened privacy expectations. Gov't Br. 24-28. But *Dickerson* speaks directly to a

search of one's effects. Although a police officer "pat-searched the front of [Dickerson's] body," it was the "officer's continued exploration of [Dickerson's] *pocket*," not Dickerson's person, that this Court concluded was an unlawful "further search." 508 U.S. at 369, 378-79 (emphasis added). The officer's tactile examination of the contents of Dickerson's pocket occasioned no additional intrusion on Dickerson's person—that intrusion was already accomplished by the officer's pat-down. *See id.* at 377 (intrusion by touching Dickerson's body was "already . . . authorized by the lawful search for weapons").

Under the Fourth Amendment, whether an unreasonable search occurs does not turn on whether one's person or one's effects are involved. See Bond Br. 14-15. It turns on whether the victim of the search had a reasonable expectation of privacy, an expectation that the Government infringed when its agents overstepped the bounds of their lawful authority. Like the officers in *Dickerson* and *Hicks*, Agent Cantu overstepped his lawful authority. The officer in *Dickerson* was authorized to frisk for weapons; when he did more, by manipulating the contents of Dickerson's pocket, he conducted an unlawful search. 508 U.S. at 377-78. The officer in *Hicks* was authorized to enter Hicks's apartment and search for a suspected shooter; when he did more, by turning over a stereo component, he conducted an unlawful search. 480 U.S. at 324-25. Agent Cantu was authorized to stop the bus in order to conduct an immigration inspection. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976). When he did more, by manipulating Bond's bag to determine whether it contained drugs, he too conducted an unlawful search.[21] Like the officers in *Dickerson* and *Hicks*, Cantu violated the Fourth Amendment.

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[21] Bond addresses Agent Cantu's failure to abide by the limits of his authority to answer the Government's claim that *Dickerson* and *Hicks* are distinguishable from Bond's case. Gov't Br. 25-26. He does not intend to address a question as to which certiorari was denied: whether the strict limits that this Court set for an immigration checkpoint stop in *Martinez-Fuerte* are violated "by the detention of bus passengers so that their luggage may be manipulated to inspect for drugs." See Bond Pet. for Cert. at 1. Bond's discussion of *Dickerson* and *Hicks* does not implicate the scope of the detention in this case.

II. IT IS THE GOVERNMENT, NOT BOND, THAT PROPOSES AN UNWORKABLE STANDARD FOR DETERMINING WHEN TACTILE EXAMINATION CONSTITUTES A SEARCH.

The Government attributes to Bond an "unworkable" standard, under which "an officer violates the Fourth Amendment if . . . he has more than 'casual' or 'incidental' contact with it." Gov't Br. 32-33, 36. Bond proposes no such rule. He argues only that Agent Cantu's intrusive tactile examination infringed his expectations of privacy in his luggage, expectations he did not forfeit when he carried his bag on board.

Contrary to its claim, it is the Government that proposes an unworkable—and dangerous—standard. The rule proposed by the Government is this: that "so long as what government agents sense could have been sensed by any other member of the public, no Fourth Amendment search has occurred." Gov't Br. 32. Under this rule, an agent's "sense" includes his sense of touch. See Gov't Br. 36. Thus, according to the Government, anything that "any member of the public could have observed" through the sence of touch, "the police were entitled to observe." Gov't Br. 36. Moreover, if any member of the public "could have observed any [part] of defendant's conduct, the police were entitled to observe all of it." *Id.*

Even if the "public" could be equated with bus passengers, the Government's proposed standard is wrong. Under its rule, police may enter restaurants and feel the pockets of coats or jackets left on a coatrack, since any member of the public could touch some part of those outergarments while hanging up his own coat or jacket.

A purse, backpack, coat, or jacket left on a spare chair at a table would also be subject to a tactile inspection by police, since a restaurant patron who needed the chair could grasp the object on it to move it out of the way. For the same reason, a bag placed in the empty seat next to its owner at an airport, or bus or train terminal, would be subject to tactile inspection by the police. The Government's rule makes no distinction between moving these items, and feeling and squeezing them. See Gov't Br. 14, 31, 36.

Not only coats and bags, but travelers themselves, would be subject to police frisks under the Government's proposed rule. Although the Government argues that different privacy interests apply to persons than apply to property, Gov't Br. 27, its proposed search rule admits of no such distinction. All who commute on public transportation know that rush hour travel subjects them to having their bodies brushed, touched, or pressed by others. The shoulders, backs, or other body parts of passengers make contact as they pass one another; legs are tangled and feet are stepped on as travelers enter and leave their seats; and polite commuters mumble "excuse me" as they place a hand on the arm or back of another to avoid closer bodily contact while passing through crowded buses, trains, and subways.[22] Because "any member of the public could have"—through the sense of touch—"observed" parts of a traveler's body, "the police [will be] entitled to observe all of it." Gov't Br. 36.

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[22] The same type of contact occurs on commercial airlines. *See* Margery Eagen, *Familiar Anger Takes Flight with Airline Tussles*, BOSTON HERALD, Aug. 15, 1999, at 8 ("Frequent fliers complain that the airlines . . . greedily cram passengers in, one on top of another. Everybody's space is invaded."); Jim Molnar, *Readers Vent Their Anger and Frustrations About Traveling by Air*, SEATTLE TIMES, May 23, 1999, at K1 ("packing people in like sardines is definitely leading to an increase in air rage"); Anne Knowles, *Get the Complete Picture*, DATAMATION, Oct. 1, 1997, at 74 (airplane passengers must "squeeze by [their] traveling companions").

The rule that the Government proposes broadly and improperly extends this Court's public-exposure cases. It is one thing to say that matters "clearly visible" to any member of the public are not protected from the eyes of the police. *Ciraolo*, 476 U.S. at 213. Little, or no, diminution of an individual's privacy expectations occurs when police see what is clearly visible to any member of the public. It is quite another thing to say that, because a fellow traveler may casually and briefly touch our belongings, the police are free to manipulate and prod those belongings in search of hidden objects. The Government's proposed extension of this Court's precedent permits "stealthy encroachments" upon the Fourth Amendment's protection of an individual's "indefeasible right of personal security, personal liberty and private property." *Mapp v. Ohio*, 367 U.S. 643, 647 (1961) (quoting *Boyd v. United States*, 116 U.S. 616, 630, 635 (1886)). It should be rejected.

CONCLUSION

The judgment of the Fifth Circuit Court of Appeals should be reversed and the methamphetamine and Bond's confessions ordered suppressed.

Respectfully submitted.

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No. 98-9349

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN DEWAYNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PRO BONO CRIMINAL ASSISTANCE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF P-CAP AS *AMICUS CURIAE*

P-CAP, the Pro Bono Criminal Assistance Project, is a Virginia nonprofit corporation organized and staffed by student volunteers at the University of Virginia School of Law. P-CAP's interest as *amicus curiae* arises from our commitment to defending the rights of indigent defendants and prisoners. P-CAP members assist indigent defendants and prisoners and their attorneys by performing legal research, drafting habeas petitions and appellate briefs, and, pursuant to third-year practice rules, providing representation in bail, habeas corpus, and 42 U.S.C. § 1983 proceedings, and presenting oral arguments to the Court of Appeals of Virginia, the Supreme Court of Virginia, and the Court of Appeals for the Fourth Circuit. Faculty members of the

School of Law and Virginia attorneys in private practice provide supervision.

P-CAP receives its funding from University of Virginia student activities funds, the University of Virginia Law School Foundation, and private donations. P-CAP has no financial interest in the outcome of this case.

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INTRODUCTION

This brief is filed pursuant to Rule 37 of the Rules of this honorable Court. Letters of consent from both parties accompany this filing.

SUMMARY OF ARGUMENT

Police groping and manipulation of personal luggage on a bus or other common carrier constitutes a search for purposes of the Fourth Amendment because passengers exhibit subjective expectations of privacy in the contents of their luggage and society is prepared to recognize these expectations as reasonable. When police groped and manipulated Petitioner Bond's bag, they did not merely touch the exterior of his bag. Rather, they actually felt the contents of his bag in a manner that could reveal the number, shape, and character of the items, perhaps very personal items, inside the bag. This manner of handling Bond's luggage was far more intrusive than the foreseeable handling by fellow passengers as they stow and retrieve their own luggage. Since the groping and manipulation by police is a much

greater intrusion than the touching by fellow passengers to which Bond knowingly exposed his luggage, this governmental groping constitutes a search for purposes of the Fourth Amendment.

The search of Bond's bag was not consensual because his purported consent was not voluntarily given. The police sought Bond's consent to search under coercive conditions where he was not free to leave due to the governmental activity of inspecting bus passengers' immigration status. A reasonable person in Bond's position would not have considered himself free to decline the agent's request to search his bag given that the agent's groping and manipulation of his bag conveyed the message that Bond lacked the authority to prevent the agent from ascertaining the contents of his bag. In addition, Bond was not advised of his right to refuse consent. Considering the totality of the circumstances surrounding Bond's encounter with the immigration agent, Bond's purported consent was not voluntary.

ARGUMENT

I. POLICE GROPING AND MANIPULATION OF PERSONAL LUGGAGE ON A BUS OR OTHER COMMON CARRIER CONSTITUTES A SEARCH FOR PURPOSES OF THE FOURTH AMENDMENT.

Government activity constitutes a "search" implicating Fourth Amendment protection when the Government intrudes upon a person who has exhibited a subjective expectation of privacy that society is prepared to recognize as reasonable. See, e.g., Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). This Court recognized in Katz that "what [one] seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected." 389 U.S. at 351 (emphasis added) (holding that a person's privacy interest in the contents of phone calls from a public phone booth is subject to Fourth Amendment protection).

Although this Court has adopted Justice Harlan's test for determining the scope of privacy interests that are subject to Fourth Amendment protection, the Court has consistently

applied the Katz standard in a manner that is inconsistent with the holding of Katz. Since Katz, this Court has consistently denied Fourth Amendment protection based on the mere possibility that public access could interfere with individuals' privacy interests. See, e.g., California v. Greenwood, 486 U.S. 35, 39-40 (1988) (holding that when police open opaque, sealed garbage bags on the curb outside a home and rummage to find evidence of what the residents are doing in the privacy of their home, the police do not thereby conduct a "search" because the garbage bags are "readily accessible to animals, children, scavengers, snoops, and other members of the public."); California v. Ciraolo, 476 U.S. 207 (1986) (holding that the Government's naked-eye aerial surveillance of the fenced-in curtilage of a person's home is not a "search" because people flying overhead on commercial planes might observe what one does in the privacy of one's backyard); Smith v. Maryland, 442 U.S. 735 (1979) (holding that police use of a "pen register" surveillance device to identify all the phone numbers called

from one's home is not a "search" because the phone company has access to this technology and uses it for billing purposes). This line of cases is based on a misapplication of the majority's explanation in Katz that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. at 351. The majority in Katz immediately clarified, "[b]ut *what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected*." Id. (emphasis added). The Court's holding is properly understood as recognizing that a subjective expectation of privacy is a necessary but not sufficient condition for Fourth Amendment protection. However, the reference in Katz to what one "knowingly exposes to the public" has been consistently taken out of context and misapplied to deny Fourth Amendment protection based on the mere possibility of public exposure. Notwithstanding one's exhibited subjective expectations of privacy with respect to one's discarded personal items, one's activities in the curtilage of

one's home, and the numbers one calls from one's home phone, this Court concluded that these privacy interests are not subject to Fourth Amendment protection because one engages in these activities with knowledge of the possibility of public exposure, however improbable. However, as Justice Harlan recognized in his Katz concurrence, individuals who exhibit subjective expectations of privacy are entitled to Fourth Amendment protection provided only that society would recognize their expectations of privacy as reasonable. The possibility that particular activities may be exposed to public observation does not imply that society is unwilling to recognize as reasonable individuals' subjective expectations of privacy with respect to these activities. Indeed, by providing legislative protection against governmental use of "pen register" surveillance,[1] Congress demonstrated our society's willingness to recognize individual subjective expectations of privacy as reasonable

[1] See 18 U.S.C. §§ 3121-3126.

notwithstanding individuals' purported knowledge of the possibility of public exposure.

This case presents this honorable Court with the opportunity to reaffirm the holding of Katz and to reinvigorate the Fourth Amendment's protection against unreasonable governmental intrusions. In keeping with the theory of Katz, this Court should consider whether the risk and degree of public exposure through the expected touching of one's luggage by other passengers is so great that police groping and manipulation of personal luggage on common carriers becomes unintrusive. If such groping and manipulation by police is a greater intrusion than the touching by fellow passengers to which the Petitioner knowingly exposed his luggage, then the Fourth Amendment's reasonableness requirement should regulate that intrusion.

When police officers or other government agents grope or manipulate the personal luggage of passengers on buses and other common carriers without warrant, probable

cause, reasonable suspicion, or consent, the Government intrudes upon the passengers' exhibited subjective expectations of privacy which society is prepared to recognize as reasonable.

A. Passengers On Buses And Other Common Carriers Exhibit Subjective Expectations Of Privacy With Respect To The Personal Effects Contained In Their Closed, Non-Transparent Luggage.

This Court has acknowledged that one exhibits a subjective expectation of privacy with respect to particular items that one places in a sealed, opaque container. See California v. Greenwood, 486 U.S. at 39. In Greenwood, this Court recognized that individuals may manifest a subjective expectation of privacy in their discarded personal items by placing them in opaque, sealed garbage bags. Id. Similarly, Petitioner Bond exhibited a subjective expectation of privacy in the personal effects that he placed in a closed, non-transparent bag during travel. In addition, Bond stored his bag in the overhead compartment directly above his seat, Id., further manifesting his intent to keep the contents of his

bag private. The placement of his bag in a compartment that was accessible to other passengers did not defeat his expectation of privacy because the foreseeable touching of his bag by other passengers did not include groping and manipulating his bag in a manner designed to reveal its contents.

B. Bus Passengers' Expectations Of Privacy With Respect To The Personal Effects Contained In Their Closed, Non-Transparent Luggage Are Objectively Reasonable Expectations.

It is well established that travelers have legitimate expectations of privacy in their luggage, which is "intended as a repository of personal effects." United States v. Chadwick, 433 U.S. 1, 13 (1977), overruled in part, California v. Acevedo, 500 U.S. 565 (1991); See also United States v. Place, 462 U.S. 696, 707 (1983) (affirming that a person's privacy interest in the contents of personal luggage is protected by the Fourth Amendment). Police groping and manipulation of luggage on common carriers infringes passengers' privacy interests in the contents of their luggage.

Since the government agent manipulated Bond's bag in a manner that he did not reasonably expect from other passengers, the agent conducted a search within the meaning of the Fourth Amendment. See United States v. Gwinn, 191 F.3d 874 (8th Cir. 1999); United States v. Nicholson, 144 F.3d 632, 639 (10th Cir. 1998).

Some courts have ruled that the intrusive police practice of groping and manipulating personal luggage on common carriers with no warrant, consent, probable cause, or reasonable suspicion does not constitute a "search" because an individual does not have a reasonable expectation of privacy in the *exterior* of his luggage. See, e.g., United States v. McDonald, 100 F.3d 1320, 1326 (7th Cir. 1996), cert. denied, 520 U.S. 1258 (1997); United States v. Guzman, 75 F.3d 1090, 1095 (6th Cir. 1996), cert. denied, 117 S.Ct. 266 (1996). These courts failed to appreciate that when police grope and manipulate luggage in a manner designed to detect contraband, they do not merely touch and feel the luggage exterior. Rather, the police are actually

feeling the personal effects contained inside the luggage. In the present case, the agent groped and manipulated Bond's luggage to such an extent that he actually felt the shape of the objects inside. The tactile observations made by means of groping and manipulating luggage are clearly distinguished from the observations that can be made by the mere touching of a bag's exterior.

The tactile inspection in the present case is also distinguished from canine sniffs which cause a very limited intrusion in terms of the manner in which information is obtained, and reveal only whether an illegal substance is present. See Place, 462 U.S. at 707; United States v. Harvey, 961 F.2d 1361 (8th Cir.), cert. denied, 506 U.S. 883 (1992). In contrast, groping and manipulating a bag reveals the contents in which the owner has a legitimate expectation of privacy. As the Eighth Circuit observed, "extensive tactile examination of a soft-sided bag's exterior by an officer may reveal almost as much information as opening the bag itself, such as information about the number, shape, and character

of the items, perhaps very personal items, inside the bag." United States v. Gwinn, 191 F.3d 874, __ (8th Cir. 1999).

In the decision below, the Court of Appeals recited and misapplied the language from Katz, "what a person knowingly exposes to the publi . . . is not a subject of Fourth Amendment protection." United States v. Bond, 167 F.3d 225, 226 (1999), quoting Katz, 389 U.S. at 347. The court noted that Bond stored his bag in the overhead luggage bin when it was reasonably foreseeable that his bag would be handled by other passengers as they stowed and retrieved their own luggage. Id. at 226. The court reasoned that since Bond knowingly exposed his bag to the public, he had no reasonable expectation that his bag would not be manipulated by others. Id.

Notwithstanding the fact that the government agent manipulated the bag in a manner calculated to detect contraband -- a manner of handling different from the foreseeable handling by other passengers -- the court held that the government agent's manner of handling Bond's bag

was irrelevant for Fourth Amendment purposes. Id. at 227. The court supported its conclusion by applying this Court's finding in Ciraolo that it was irrelevant that the government's aerial surveillance of the defendant's backyard was conducted by officers who were trained to recognize marijuana and was directed at identifying marijuana. Id. at 227, citing Ciraolo, 476 U.S. at 213. This reliance on Ciraolo is misplaced given this Court's reasons for disregarding the officers' training and purpose as irrelevant. The majority in Ciraolo considered these facts irrelevant because the nature of the officers' naked-eye observations was held to be *the same* as the observations that could be made by any member of the public who glanced down while flying in the same airspace. See Ciraolo, 476 U.S. at 213-14. In the present case, however, the nature of the agent's observations was not the same as the observations that Bond could reasonably expect his fellow passengers to make. The agent's groping and manipulation of Bond's bag, calculated to ascertain its contents, enabled the agent to make tactile

observations of the personal effects in Bond's luggage that could not be made by fellow passengers unless their touching of Bond's bag went beyond what was necessary to stow and retrieve their own luggage.

Even if the expected touching of one's luggage by other passengers might enable them to ascertain the contents of one's luggage, this possibility of public exposure is not sufficient to rule out Fourth Amendment protection of one's privacy interest in the personal effects contained in one's luggage. As the majority in Katz clarified, "*what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.*" 389 U.S. at 351. (emphasis added). Given the unlikelihood that the legitimate handling of one's luggage by other passengers will enable them to ascertain its contents, the deliberate groping and manipulation of one's personal luggage by police is not rendered reasonable merely because of the expectation that other passengers will move one's luggage when stowing or retrieving their own. Since the groping and manipulation by

police is a greater intrusion than the touching by fellow passengers to which Bond knowingly exposed his luggage, this governmental groping constitutes a search for purposes of the Fourth Amendment.

The agent's groping and manipulation of passengers' bags is analogous to the manipulations that one might expect from a trained camera thief. Bond's subjective expectation that his personal effects would not be exposed to the intrusive tactile observations of a brazen thief -- or curious constable -- is a reasonable expectation that merits Fourth Amendment protection. Persons who travel by means of public transit are entitled to the protection of their right to be secure in their personal effects against such unreasonable governmental searches.

II. THE GOVERNMENT AGENT'S SEARCH OF PETITIONER BOND'S PERSONAL LUGGAGE WAS NOT CONSENSUAL.

Searches conducted without a warrant are *per se* unreasonable unless a valid exception to the warrant requirement is applicable. Schneckloth v. Bustamonte, 412

U.S. 218, 219 (1973). Voluntary consent to a search is such an exception. Id. The Government has the burden of proving that a defendant's purported consent was voluntary. United States v. Mendenhall, 446 U.S. 544, 557 (1980). Although the court below stated that "Bond consented to the search of the inside of his bag," United States v. Bond, 167 F.3d at 226, the court does not state the basis for this conclusion. Since this conclusion is not supported by the record, it should be rejected as clearly erroneous.

To determine whether consent to search was freely and voluntarily given, the totality of the circumstances surrounding the consent must be examined. See Schneckloth v. Bustamonte, 412 U.S. at 227. See also Ohio v. Robinette, 519 U.S. 33 (1996). Unlike passengers on a bus during a typical police sweep, Petitioner Bond was on a bus that was stopped for an immigration inspection at a permanent Border Patrol checkpoint in Texas. United States v. Bond, 167 F.3d at 226. The government agent boarded the bus and checked the passengers' immigration status as he moved toward the

rear of the bus. Id. Bond and his fellow passengers were not at liberty to leave the bus or to otherwise terminate their encounter with the agent because the legality of their very presence in the country was under investigation. Although the agent had already checked Bond's immigration status before he manipulated luggage and requested consent to search Bond's bag, Id., the agent's groping and manipulation of luggage could have been reasonably construed as evidence that the agent was not yet satisfied that all of the passengers were lawfully in the United States. Therefore, since Bond's lack of freedom to leave was the result of police activity, Bond's person was seized. See Florida v. Bostick, 501 U.S. 429, 436 (1991). The seizure of one's person is an inherently coercive condition. In addition to being seized, Bond also witnessed the agent's groping and manipulation of his luggage without his consent. This display of authority was also a coercive condition. Given the additional fact that Bond was not advised of his right to refuse consent to the

search, the record does not support a finding that Bond's consent to the search was voluntary.

Even if the immigration stop did not by its nature constitute a seizure, Bond's purported consent was not voluntary because a reasonable person in his position would not feel free to decline the agent's request or otherwise terminate the encounter. See Bostick, 501 U.S. at 436. According to this Court,

> the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."

Id. at 437, quoting Michigan v. Chesternut, 486 U.S. 567, 569 (1988). As this Court clarified,

> no seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage -- *so long as the officers do not convey a message that compliance with their requests is required.*

Bostick, 501 U.S. at 437 (emphasis added).

The government agent in the present case did convey the message to Bond that his compliance with their request to search his bag was required. This message was conveyed when the agent groped and manipulated Bond's bag in a manner that was likely to reveal the number, shape, and character of the items, perhaps very personal items, inside his bag. Since this conduct by the agent was done without Bond's consent, it communicated to Bond that he lacked the authority to prevent the agent from ascertaining the contents of his bag. Considering the totality of the circumstances surrounding Bond's encounter with the immigration agent, Bond's purported consent was not voluntary.

CONCLUSION

For the foregoing reasons, we respectfully urge this honorable Court to reverse the decision of the Court of Appeals for the Fifth Circuit affirming the denial of Petitioner Bond's suppression motion and to vacate Bond's convictions.

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IN THE
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STEVEN DEWAYNE BOND,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

STEVEN DEWAYNE BOND,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (the "NACDL") is a professional bar association founded in 1958 for the purpose of advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of a crime or other misconduct. Today, the NACDL has almost 10,000 direct members and 80 affiliates representing another 28,000 members, who include private criminal defense lawyers, public defenders, active U.S. military defense counsel and law professors. The NACDL has members in all fifty states, and the American Bar Association recognizes the NACDL as an affiliate organization and

[1] Both parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief. Amici wish to recognize the research and drafting contribution to this brief of Wesley M. Oliver, Instructor, Tulane Law School.

awards it full representation in its House of Delegates.

Among the NACDL's objectives is to deter overreaching conduct by law enforcement officers by vigorously defending the protections guaranteed by the Constitution. The NACDL believes that this case may have a significant impact in determining the scope of the Fourth Amendment's prohibition against unreasonable searches. Accordingly, the NACDL presents this brief in support of the Petitioner to urge this Court to hold that the conduct of the agent in question constituted a search, meaning that it could not be undertaken on a mere whim but must be shown to be reasonable under the Fourth Amendment.

The Association of Federal Defenders (the "AFD") was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment of the United States Constitution. The AFD is a nation-wide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. The AFD's mission includes filing amicus curiae briefs to present the position of indigent defendants in the federal criminal justice system. The AFD is concerned that its clients may be subjected, without cause, to intrusive police conduct like the probing and squeezing of the luggage of the Petitioner in the present case. The AFD joins the NACDL in urging this Court not to place such conduct outside the Fourth Amendment's protection by classifying it as not a search, but to require police to demonstrate that such conduct is constitutionally reasonable.

SUMMARY OF ARGUMENT

In everyday circumstances of contemporary life, people often find themselves and their belongings in crowded and tight

settings—whether riding on buses, airplanes, trains and ferry boats; waiting in lines; riding elevators; ascending escalators; or simply walking down crowded city sidewalks. In such settings, people expect, and they and their belongings sometimes experience, bumping or jostling and other incidental touching. They do not expect, and would be greatly offended to experience, fondling or manipulation by a stranger's fingers of their persons or effects. Even in such settings, where some touching by others is unavoidable, a probing squeeze is likely to be a tort or crime.

To most people, this distinction—between an incidental touching and a deliberate and invasive grope—is obvious, and it is recognized in tort law. Yet the distinction eluded the court of appeals, which saw no significant difference between the incidental touching and movement of luggage that occur when passengers on a bus or train must share an overhead bin, and a law enforcement officer's systematic and "hard" squeezing and manipulation of passengers' luggage in the bin to detect whatever his fingers can feel about the size, shape, texture, rigidity, and density of the contents. On the view of the lower court, when passengers use an overhead bin, they invite any police officer to hold and squeeze their luggage and manipulate its contents at will; no justification would be necessary, for such conduct would not constitute a search or seizure. Law enforcement agents could freely conduct general exploratory examinations of this kind of people's luggage and other effects.

Since the Court's decision in *Katz v. United States*, 389 U.S. 347 (1967), the touchstone for deciding when police conduct amounts to a search for Fourth Amendment purposes has been whether it violates a person's reasonable expectation of privacy. Petitioner had a reasonable expectation of privacy against the agent's actions. By all objective evidence, Petitioner intended for the contents of his luggage, including the methamphetamine brick,

to remain private. Petitioner evidently wrapped it in tape, then wrapped a pair of pants around it, and placed it inside a closed and opaque cloth bag. He then kept the bag at hand, just over his seat in the bus. The contents were not exposed to other passengers' view and would not be revealed by the momentary and incidental surface touching that might occur when other passengers placed their own luggage in the bin. No reasonable person would expect a fellow passenger to act as did Agent Cantu, by squeezing and manipulating a stranger's luggage "very hard" to identify the contents. Any passenger who tried should expect, and would deserve, a strong reaction. The intrusion of the agent's probing fingers was obviously and substantially more invasive than anything Petitioner should be deemed to have invited when he placed his luggage in the overheard bin. Travelers do not, and should not be made to, subject themselves to such intrusions when they use the overhead bins and racks on buses, trains, airplanes, ships and other vehicles. People should not forfeit their expectation of privacy against such conduct when the needs of everyday life require them to expose their luggage or other effects to incidental or accidental touching by other people in public places. As Judge Ripple wrote in dissent in *United States v. McDonald*, 100 F.3d 1320 (7th Cir. 1996):

> No federal judge traveling by bus or rail would expect, or permit, a fellow passenger to rub, squeeze or manipulate his or her hand baggage in a concerted attempt to determine the contents. We should protect for others the privacy that we would demand for ourselves.

Id. at 1334.

ARGUMENT

I. AN OFFICER'S INTRUSION IS A SEARCH WHEN IT IMPINGES ON A PERSON'S REASONABLE EXPECTATION OF PRIVACY.

In *Katz v. United States*, 389 U.S. 347 (1967), the Court held that a search occurs within the meaning of the Fourth Amendment when official action "violate[s] the privacy upon which [the person] justifiably relied," whether or not there is an actual physical trespass. *Id.* at 353. Justice Harlan, concurring, elaborated: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). In several later cases, the Court has applied Justice Harlan's formulation. *E.g., United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ("A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."); *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (quoting Justice Harlan's concurrence). In *Rakas v. Illinois*, 439 U.S. 128 (1978), the Court explained further that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to the concepts of real or personal property or to understandings that are recognized and permitted by society." *Id.* at 143-44 n.12; *see also* Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 2.1 (3d ed. 1996) ("[C]ourts . . . seem to have drawn upon the customs and sensibilities of the populace in determining what expectations of privacy are constitutionally reasonable.").

In some of the Court's post-*Katz* cases, the first prong seems decisive. For example, in *United States v. Knotts*, 460 U.S. 276

(1983), the Court seemed to find that Knotts could make no claim that he actually maintained the privacy of the information the government acquired. The Court held that warrantless monitoring of an electronic tracking device, or beeper, was not a search, because the monitoring principally revealed the route a car took along public roads, and visual surveillance would have revealed exactly the same information. No one in Knotts's position could have expected this information to be private.

In other cases, the Court at least assumed that an individual subjectively expected to maintain his or her privacy, but the Court held that this expectation was objectively unreasonable. In *California v. Ciaraolo*, 476 U.S. 207 (1986), the Court held that a naked-eye aerial observation of a person's backyard was not a search. Ciraola grew marijuana plants in his backyard and attempted to hide them behind two fences. The Court found that "[c]learly—and understandably—respondent has met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits." *Id.* at 211. Nonetheless, the Court deemed this expectation unreasonable, for anyone else lawfully flying overhead could have made out the marijuana plants just as the police had done. *Id.* at 213-14. The Court said that the ultimate test of the "reasonableness" of a person's privacy expectation is "'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.'" *Id.* at 212 (quoting *Oliver v. United States*, 466 U.S. 170, 181-83 (1984)).

The government sometimes claims that there was no infringement of a reasonable expectation of privacy, because the police caused no wider breach of a person's legitimate privacy expectations than already was caused by an antecedent search by a private party. In *United States v. Jacobsen*, 466 U.S. 109 (1984), the Court described the standard that applies in this setting:

> The additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search. That standard was adopted by a majority of the Court in *Walter v. United States*, 447 U.S. 649 (1980). . . .
>
> . . . .
>
> This standard follows from the analysis applicable when private parties reveal other kinds of private information to the authorities . . . . The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated. In such a case the authorities have not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant.

Id. at 115-18 (notes omitted).

II. AN OFFICER'S AGGRESSIVE PALPATION OF LUGGAGE IN AN OVERHEAD BIN IN A BUS VIOLATES THE REASONABLE EXPECTATION OF PRIVACY OF THE PASSENGERS.

Tested against these standards, Border Patrol Agent Cantu's conduct amounted to a search. First, Petitioner unquestionably demonstrated a subjective expectation of privacy in the contents of his luggage, which he concealed from public view inside a closed and opaque container. The methamphetamine brick, in addition, was twice-wrapped, in duct tape and then a pair of pants. Petitioner also kept the luggage close at hand, just above his seat. Such

luggage and its contents are within the core meaning of the "effects" that the Fourth Amendment protects against unreasonable searches and seizures, and the Court has consistently recognized the people's privacy interests in luggage and similar containers. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Court said that "[a] search of a child's . . . closed purse or other bag carried on her person . . . is undoubtedly a severe violation of subjective expectations of privacy." *Id.* at 337-38. The same is true of a traveler's luggage.

Second, a general claim that the contents of one's luggage should remain private surely satisfies the second *Katz* prong. It virtually goes without saying that society is prepared to recognize as reasonable and legitimate the privacy interest in the contents of one's luggage. The Court in *T.L.O.* said that "[w]e have . . . recognized that searches of closed items of personal luggage are intrusions on protected privacy interests, for 'the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view.'" *Id.* at 337 (quoting *United States v. Ross*, 456 U.S. 798, 822-23 (1982)). *Ross* itself recognized the protections the Fourth Amendment extends to containers of all kinds that passengers in common carriers use to hold their belongings:

> For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.

Ross, 456 U.S. at 822; *see also, e.g., United States v. Place*, 462 U.S. 696, 707 (1983) ("We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment.").

Of course, a person's privacy interest in luggage is violated if the police arbitrarily open it and rummage through its contents. This interest also is violated when an officer manipulates and squeezes the luggage without opening it, to identify the contents of the bag tactually. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court said that "it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing . . . is not a 'search.'" *Id.* at 16. It would torture the language equally to say that a thorough exploration of the contents of luggage is not a search unless the luggage is opened. Here, Agent Cantu methodically worked his way from the back of the bus, probing and squeezing the luggage overhead and at the passengers' feet. Presumably, if he encountered a coat on the overhead rack along with the luggage, he would have probed and squeezed it, too. This technique allowed the agent to detect the size, shape, weight, quantity, texture, and hardness of belongings of all the passengers (or at least those unguarded enough not to travel with hard-cased luggage). Unless, as the court of appeals held, the passengers had forfeited privacy rights in their luggage by storing it on board, this conduct surely was a search.[2]

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[2]The agent's conduct should be distinguished from other techniques that have been held not to constitute a search, such as pressing lightly on a bag to squeeze air from it for a drug-detecting dog to sniff, *United States v. Lovell*, 849 F.2d 910, 915 (5th Cir. 1988), or removing a bag from an overhead rack to the floor, closer to a police dog. *United States v. Harvey*, 961 F.2d 1361 (8th Cir. 1992). Such techniques do not expose a bag's contents as did Agent Cantu's probing and manipulation of Petitioner's bag.

To be sure, much of the information the agent gathered no doubt was mundane—maybe the number of pairs of shoes a passenger carried, whether he or she packed a toothbrush, how much and possibly what kind of clothing the passenger packed, and whether the passenger took along a book. But as the Court said in *Arizona v. Hicks*, 480 U.S. 321 (1987), "A search is a search, even if it happens to disclose nothing but the bottom of a turntable," *id.* at 325, and the same is true if it uncovers only everyday information of this sort. People are entitled to keep even such unremarkable information private. Moreover, exposure of more intimate or embarrassing matters by Agent Cantu's technique can easily be imagined.

In the view of the court of appeals, however, Petitioner's expectation of privacy against this sort of intrusion became unreasonable once he placed his luggage in the overhead bin, where other passengers could touch or push it while making room for their own.[3] The court of appeals seems to have proceeded from one of two premises. Either it assumed there is no difference between incidental surface touching by other passengers and the "very hard" squeezing and manipulation by the agent, or it recognized the difference but assumed that the possibility of unintrusive contact by a fellow passenger justified more intrusive probing, squeezing, and manipulation by a law enforcement officer.

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[3] Other courts of appeals, of course, have seen this situation differently. *See United States v. Gwinn*, 191 F.3d 874, 877-79 (8th Cir. 1999) (purposeful manipulation of bag in overhead bin on Amtrak train was a search); *United States v. Nicholson*, 144 F.3d 632, 639 (10th Cir. 1998) (same finding, on bus); *United States v. Most*, 876 F.2d 191, 197-98 (D.C. Cir. 1989) (individual retained reasonable expectation of privacy in bag temporarily checked with store clerk).

In either event, the court of appeals was in error. Such reasoning conflicts with *Minnesota v. Dickerson*, 508 U.S. 366 (1993). There, the Court held that although an officer was authorized to conduct a *Terry*[4] patdown of the suspect's outer clothing for weapons, this authority ceased when the frisk showed that Dickerson was unarmed. Thus, the officer violated the Fourth Amendment when, to explore a "lump" he had felt in the patdown, he engaged in "'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket'—a pocket which the officer already knew contained no weapon." *Id.* at 378 (quoting lower court opinion). The *Dickerson* Court held that the officer, though he did not reach into the pocket, "overstepped the bounds of the 'strictly circumscribed' search for weapons allowed under Terry." *Id.* (quoting *Terry*, 392 U.S. at 26). The Court recognized the distinction between surface touching, on the one hand, and subsequent more intrusive squeezing and manipulation of items inside the clothes, on the other. The Court held that even if the former intrusion was justified, separate justification was necessary for the latter. Because such justification was missing, the second stage of the officer's search violated the Fourth Amendment.

Yet on the analysis of the court of appeals in the present case, the officer's manipulation of Dickerson's pocket would have to be allowed. Under that analysis, once Dickerson was subject to a valid patdown, he had no further privacy right worth protecting in the contents of his pocket against the manipulations of the officer's fingers. Either the distinction between these intrusions was unworthy of notice, or, if it was significant, then the lesser intrusion, *i.e.*, the patdown, nevertheless justified the greater. Contrary to such reasoning, the Court in *Dickerson* said emphatically that a line must be maintained between the

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[4] *Terry v. Ohio*, 392 U.S. 1 (1968).

permissible patdown and the impermissible, and more intrusive, squeezing and probing of the suspect's pocket. The Court said that the officer's authority under *Terry* "must be strictly 'limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.'" *Id.* at 373 (quoting *Terry*, 392 U.S. at 26).

The Court has rejected expressly the idea that a lesser private intrusion may justify a greater official intrusion. When a law enforcement officer's only justification for a search is a prior private search, then the official search must not enlarge the breach of privacy that has already occurred. In *Jacobsen*, the Court adopted the principle that "'surely the Government may not exceed the scope of the private search unless it has the right to make an independent search. . . .'" 466 U.S. at 116 (quoting *Walter*, 447 U.S. at 657 (Stevens, J.)). Thus, the possibility that other passengers may have touched Petitioner's luggage in some less invasive way cannot justify Agent Cantu's "very hard" squeezing and manipulation of it. The agent's conduct exceeded the scope of any "private search" that may have occurred before.

In addition, "understandings that are recognized and permitted by society," *Rakas*, 439 U.S. at 143-44 n.12, certainly support the claim of bus passengers to a reasonable expectation of privacy against a law enforcement officer's general exploration of the contents of their luggage using Agent Cantu's technique. If another passenger on a bus, train, or airplane attempted what the agent did, it would be a severe breach of "the everyday expectations of privacy that we all share." *Minnesota v. Olson*, 495 U.S. 91, 98 (1990).

The law reflects this understanding. While bumping and other contact are to be expected in crowded public settings, the law long has afforded protection against purposeful conduct that goes

beyond these incidental and inevitable intrusions. "Consent is assumed to all those ordinary contacts which are reasonably necessary to the common intercourse of life such as a tap on the shoulder to attract attention, a friendly grasp of the arm, or a casual jostling to make a passage." William L. Prosser, *Law of Torts*, 37 (1971). Thus, for example, "[i]f two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it is no battery." *Cole v. Turner*, 6 Mod. Rep. 149, 90 Eng. Rep. 958 (1704). But there is no such tolerance for more intrusive and offensive acts, such as groping. *See, e.g., Fields v. Cummins Employees Federal Credit Union*, 540 N.E.2d 631, 640 (Ind. Ct. App. 1989) ("An attempt to kiss or fondle a woman without her consent has been held to be an assault and battery."); *Liljegren v. United Rys. Co. of St. Louis*, 227 S.W.2d 925 (Mo. Ct. App. 1921) (unwanted kissing of passenger on train is an assault); *People v. Sanchez*, 83 Cal.App.3d Supp. 1, 3 (Cal. App. Dep't Super. Ct. 1978) (groping is criminal assault); *Campbell v. State*, No. 05-94-00827-CR, 1995 WL 73091, at *2 (Tex. Crim. App. Feb. 23, 1995) (affirming public lewdness conviction on evidence of non-accidental groping). Likewise, a diner surely should expect a waiter to remove a plate from the table, but under Texas law, a restaurant employee who takes the plate from a diner's hand in a loud and offensive manner may be liable in tort for battery. *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967). And it has been held that a college professor may be liable in tort for pounding on a student's desk while shouting at her, though a less offensive touching of the desk could not be actionable. *Jung-Leonczynska v. Steup*, 803 P.2d 1358 (Wyo. 1990).

As these decisions and many others show, lines can and should be drawn. In various public settings, some incidental, harmless, or accidental touching is to be expected and must be

tolerated. But the law protects against conduct that is significantly more intrusive or offensive.

Failure to observe this line would authorize law enforcement officers everywhere, for almost any reason or no reason at all, to conduct similar sweeps of buses, trains, and airplanes to examine all the passengers' luggage and other belongings. It also could authorize the police to squeeze and probe people's effects whenever they are brought into crowded public settings where some incidental touching or bumping is possible. The belongings could include not only bags and luggage, but also purses, briefcases, backpacks, a coat slung over the arm, or any other soft-sided containers or repositories of personal effects. The settings where suspicionless probing of selected individuals' belongings, or people's belongings *en masse*, now would be allowed could include subways, elevators, escalators, crowded shopping malls, ballparks, stadiums, theaters, auditoriums, outdoor concerts, crowded city sidewalks, or anywhere else people squeeze together or gather in crowds.

The Court should recognize the difference between the incidental but non-intrusive bumping or touching that can occur in public places, and the kind of deliberate probing and squeezing that Agent Contu carried out. Even in settings where people should expect some incidental contact, conduct like the agent's actions here constitutes a search within the meaning of the Fourth Amendment.

CONCLUSION

The Court should find that Agent Cantu conducted a search within the meaning of the Fourth Amendment when he squeezed and probed Petitioner's luggage in the overhead bin of the bus.

Accordingly, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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Steven DeWayne Bond,

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v.

United States of America,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, IN SUPPORT OF THE RESPONDENT

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ARGUMENT:

I. A passenger on a common carrier does not have an objectively reasonable expectation of privacy in the outside of soft-sided luggage placed in an overhead luggage rack, because the luggage is exposed to handling and touching by the public. Therefore, a law enforcement officer's minimal intrusion of touching or other handling of such a bag of luggage does not constitute a search and is thus reasonable under the Fourth Amendment. 5

II. In determining what is reasonable under the Fourth Amendment, the individual's right to privacy is balanced against the need for effective law enforcement. To circumvent drug interdiction efforts near the border or on the open seas, drug traffickers resort to various modes of transportation, depending on where law enforcement is placing the greatest pressure, based on available resources. As a means of uncovering drugs covertly transported via common carriers, effective law enforcement requires that law enforcement officers be able to touch or handle items in transport, which are open to the public's view, touch, and handling. 12

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Police Organizations, Inc. (hereafter "NAPO"), including its 501(c)(3) affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, submits this brief in support of the Respondent United States of America.[1] NAPO seeks to affirm the decision of the U.S. Court of Appeals for the Fifth Circuit, which affirmed the trial court's admission into evidence of a "brick" of methamphetamine, which served as the basis for the Petitioner's conviction.

NAPO is a national non-profit organization, representing state and local law enforcement officers in the United States. It is a coalition of police associations and unions that serves to advance the interests and legal rights of law enforcement officers through education, legislation, and advocacy of the fundamental due process and workplace rights of officers. NAPO represents 4,000 law enforcement organizations, with 250,000 sworn law enforcement officers and 11,000 retired officers. NAPO represents directly and indirectly (through statewide organizations) approximately 775 law enforcement officer organizations, having almost 61,000 sworn law enforcement officers, in Arizona, California, and Texas, three of the four States bordering the U.S.-Mexico border, which are likely to be the most affected by the Court's decision in this case.

NAPO's members have a significant interest in the important issues of law before this Court, as the impact of the Court's decision will directly impact their ability to effectively enforce the law. Officers are sworn to enforce the criminal laws, including the laws pertaining to importation, transportation and

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[1]Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of the brief.

possession of illegal drugs. They must investigate potential drug violations and the means by which those drugs are transported, utilizing every appropriate and reasonable method available, in order to interdict these drug shipments and apprehend those committing these offenses.

WRITTEN CONSENT OF THE PARTIES

Counsel of record for both the Petitioner and the Respondent have consented in writing to the filing of this *amicus curiae* brief, pursuant to Supreme Court Rule 37.3(a). These letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

The *amicus curiae* adopts the factual statement as set forth in the Respondent's brief in opposition to the petition for a writ of certiorari, which was filed with this Court on September 3, 1999. What follows is a shorter narrative of the facts and proceedings.

On July 17, 1997, the Petitioner, Steven DeWayne Bond, was a passenger onboard a Greyhound bus traveling through Texas, when it was stopped by Border Patrol agents at the Sierra Blanca permanent Border Patrol checkpoint.[2] Subsequently, Border Patrol Agent Cesar Cantu diverted the bus into the secondary checkpoint traffic lane to conduct an immigration inspection. Agent Cantu boarded the bus and began checking the immigration status of each of the passengers, working his way from the front of the bus to the back. Upon reaching the back of the bus, Agent Cantu was satisfied that all of the passengers were lawfully present in the United States.

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[2] *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), upheld the reasonableness of the Border Patrol's use of permanent checkpoints for the purpose of briefly questioning vehicle occupants about citizenship and immigration status. Therefore, the stop of the bus and the Border Patrol agent's presence on the bus are not at issue in this case.

As Agent Cantu returned toward the front of the bus to exit, he touched and squeezed the luggage stored on the racks above the seated passengers. Agent Cantu squeezed one particular piece of luggage, a soft-sided green canvas bag located in the overhead luggage bin above Petitioner's seat. The agent noticed that the bag contained a hard "brick-like" object that he suspected was narcotics. Agent Cantu inquired as to the owner of the bag, and the Petitioner admitted that the bag belonged to him. The Petitioner consented to a search of its contents, which revealed a "brick" of methamphetamine weighing 1.34 pounds.

Agent Cantu placed the Petitioner under arrest and advised him of his Miranda rights. The Petitioner subsequently told Agent Cantu that he was transporting the methamphetamine from California to Little Rock, Arkansas, for delivery there. The Petitioner then repeated this confession to another law enforcement officer later that same day. Consequently, the Petitioner was indicted for conspiracy to possess and possession with intent to distribute methamphetamine.

Prior to trial, the Petitioner moved to have the methamphetamine suppressed as the fruit of an illegal search. The district court denied the motion. The Petitioner then waived his right to a jury trial, and the district court found him guilty on both counts. The Petitioner appealed the district court's denial of his motion to suppress the methamphetamine to the U. S. Court of Appeals for the Fifth Circuit, which affirmed the district court's holding. *United States v. Bond,* 167 F.3d 225 (5th Cir. 1999).

SUMMARY OF ARGUMENT

I

The Fourth Amendment prohibits warrantless intrusions of an individual's privacy only where the expectation of privacy is legitimate, in other words recognized by society as reasonable. Because an individual's expectation of privacy is subjective, it

varies according to the circumstances under which the expectation arises. Courts have generally recognized that the privacy interest of individuals in transit on a bus, train, or airplane is substantially less than that attached to a fixed dwelling. This is because "[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection." *Katz v. United States*, *infra*.

An individual who knowingly exposes the exterior of his or her bags of luggage to being physically touched by other persons on a common carrier does not have a reasonable expectation of privacy that the exterior of the luggage would not be held, handled, manipulated, or otherwise touched by others. Therefore, the Petitioner in this case did not have a reasonable expectation of privacy in the bag which he placed in the overhead compartment on the bus. The agent's touching of the Petitioner's luggage under these circumstances is a minimal intrusion which is not a search for purposes of the Fourth Amendment.

II

The Border Patrol agent's actions in this case comported with the public interest in and need for effective law enforcement, a factor considered in applying the Fourth Amendment's prohibition on unreasonable searches. Stopping the distribution of illegal drugs, once smuggled into the United States from Mexico or elsewhere, is a major duty of law enforcement officers.

It is commonly known that drug cartels have immense resources with which to conduct this smuggling and trafficking and can adapt quickly, using different means of transport, not only to smuggle drugs into the United States but also to distribute them within the country. Drug traffickers are adaptable, reacting to interdiction successes by shifting routes and changing modes of transportation, to which law enforcement agencies must react. This Nation's war on drugs must be unrelenting and diligent, and will necessarily involve the touching of luggage on buses, trains,

and airplanes, all frequently used methods of transportation for unlawful drugs.

Accordingly, the very minimal intrusion by the Border Patrol agent in this case was reasonable under the Fourth Amendment, because the Petitioner's privacy interest in the outside of his luggage was negligible, as compared to the public interest in effective law enforcement in the "war on drugs", including the utilization of effective investigative measures.

ARGUMENT

I. A passenger on a common carrier does not have an objectively reasonable expectation of privacy in the outside of soft-sided luggage placed in an overhead luggage rack, because the luggage is exposed to handling and touching by the public. Therefore, a law enforcement officer's minimal intrusion of touching or other handling of such a bag of luggage does not constitute a search and is thus reasonable under the Fourth Amendment.

The Fourth Amendment to the United States Constitution states, in pertinent part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches an seizures, shall not be violated . . . ." U.S. Const. amend. IV. When interpreting these words, this Court has uniformly held that:

> ... the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable", a "reasonable", or a "legitimate expectation of privacy" that has been invaded by government action. This inquiry ... embraces two discrete questions. The first is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy. ... The second question is

> whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable.

Smith v. Maryland, 442 U.S. 735, 740 (1979).

Hence, because an individual's expectation of privacy is subjective, it varies according to the circumstances under which the expectation arises. *Id.* at 740. While the Constitution does protect against warrantless intrusions, it does so only where the individual's expectation is legitimate. *United States v. McDonald*, 100 F.3d 1320 (7th Cir. 1996). Indeed, this Court has held that under some circumstances, this expectation is significantly lowered. For example, in *United States v. Martinez-Fuerte,* this Court held that "one's expectation of privacy in an automobile ... [is] significantly different from the traditional expectation of privacy and freedom in one's residence. 428 U.S. 543, 561 (1976) (citing *United States v. Ortiz*, 422 U.S. 891 at 896 n.2 (1975), and *Cardwell v. Lewis*, 417 U.S. 583, 590-591 (1974)(plurality opinion)).

With respect to the issues presented in the instant case, this Court has " 'affirmed that a person possesses a privacy interest in the *contents* of personal luggage that is protected by the Fourth Amendment.' " *McDonald,* 100 F.3d at 1324 (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)) (other citations omitted). However, courts have "generally recognized that the privacy interest of people who are in transit [i.e., on a bus, train, or airplane] on 'public thoroughfares [is] substantially less than those that attach to a fixed dwelling'", *Id.* 100 F.3d at 1324 (quoting *United States v. Rem*, 984 F.2d 806 (7th Cir. 1993), cert. denied, 510 U.S. 913 (1993)) (other citations omitted), because, in part, "[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967).

The courts have consistently refused to use a bright line

rule to determine what constitutes a search for the purposes of the Fourth Amendment. Rather, they have chosen to analyze each case individually, analyzing and weighing the defendant's expectation of privacy, the degree of intrusiveness of the search, and the totality of the circumstances in order to make their determination in "luggage" cases.

Under a circumstance similar to the instant case, the Sixth Circuit applied the "reasonable expectation of privacy" test to determine whether a police officer's touching of the outside of a passenger's bag, which was located in an overhead compartment on a Greyhound bus, constituted a violation of the Fourth Amendment. *United States v. Guzman*, 75 F.3d 1090, 1092 (6th Cir. 1996). In so doing, the court stated:

> We find that there is a meaningful distinction between an individual's privacy interest in the interior and the exterior of his luggage. While a passenger on a common carrier has a reasonable expectation that the contents of his luggage will not be exposed absent consent or a search warrant, we join the Eight Circuit and hold that this expectation of privacy does not extend to the exterior of or airspace surrounding the luggage.

Id. at 1095. Consequently, the court held that, because there is no reasonable expectation of privacy in the exterior of luggage while it is on the luggage rack, the police officer's initial touch of the exterior of the bag did not constitute an "unreasonable search in violation of the Fourth Amendment." *Id.*

In a similar case, the Fifth Circuit focused on the degree of intrusiveness of the police officer's contact with defendant's luggage. *United States v. Lovell*, 849 F.2d 910 (5th Cir. 1988). In *Lovell*, United States Border Patrol agents were conducting surveillance at the El Paso International Airport. The agents removed Lovell's luggage from the conveyor belt and felt along

the sides of the bags. After one of the agents felt a mass in Lovell's bag, the agent compressed the sides of the bags to expel air, and noticed that the expelled air smelled like marijuana and talcum powder. Consequently, the agents subjected Lovell's bags to a canine sniff, the result of which reinforced their initial suspicions of the presence of marijuana. Lovell moved to suppress the evidence alleging that "the agents' actions constituted an improper search under the fourth amendment." *Id.* at 911. Lovell's motion raised the following questions, in the context of the instant case: " ([1]) did the agent's compression of Lovell's bags constitute either a search or a seizure; and ([2]) did the agents' sniff of Lovell's bags constitute a search?" *Id.* at 911-912.

The Fifth Circuit applied a "degree of intrusiveness" test and held that a light press of the hands along the outside of a suitcase is [not] sufficiently intrusive to constitute a search in violation of the Fourth Amendment. *Id.* at 913. Explaining further, the *Lovell* court stated:

> Some investigative procedures designed to obtain incriminating evidence from the person are such minor intrusions upon privacy and integrity that they are not generally considered searches or seizures subject to the safeguards of the fourth amendment.

849 F.2d at 913 (quoting *Bouse v. Bussey*, 573 F.2d 548, 550 (9th Cir. 1977)). Applying the same "degree of intrusiveness" test, the *Lovell* court also held that subjecting defendant's luggage, located in a public place, to a sniff by a trained canine did not constitute a search within the meaning of the Fourth Amendment, because a canine sniff, like an officer's touching and squeezing of the outside of a bag, "does not require opening the luggage." It "does not expose noncontraband items that would otherwise remain hidden from public view", and does not "subject [the owner of the property] to the embarrassment and inconvenience entailed in a less discriminate and more intrusive investigative

search" because the information obtained is limited. *Id.* at 914. The court concluded that the police officer acted in accordance with the passenger's legitimate expectation that his bag would be moved or handled.

In hearing a case markedly similar to the case at bar, the Seventh Circuit also held that a police officer's touching of the outside of a passenger's bag did not constitute a search for purposes of the Fourth Amendment. *United States v. McDonald*, 100 F.3d 1320 (7th Cir. 1996). In *McDonald*, police officers boarded a bus during a layover at a bus station, after the passengers had exited. As the officers walked down the aisle of the bus, they pushed and felt the outside of pieces of luggage in the overhead compartment. In so doing, one of the officers felt a hard brick like shape in each of two soft sided-bags. The officer suspected that the objects were drugs, and asked another officer for his opinion. That officer also suspected that the objects were drugs. The officers did not remove the bags, but instead, exited the bus. The passengers re-boarded the bus, after which time the officers re-boarded and asked all of the passengers to whom the suspicious bags belonged. No one claimed ownership, so the officers considered the bags abandoned, opened them, and discovered eleven kilogram bricks of cocaine. Subsequently, the officers determined that McDonald owned the bags and placed her under arrest. *Id.* at 1323.

In McDonald appeal of the denial of her motion to suppress the cocaine as evidence, she argued that the police officers' contact with the exterior of her luggage, while it was in the overhead rack, constituted an illegal search under to the Fourth Amendment. *Id.* at 1323-24. The appellate court recognized that people in transit on public thoroughfares have a substantially less expectation of privacy than those in fixed dwellings, and that " '[w]hat one knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.' " *Id.* at 1325 (quoting *California v. Greenwood*, 486 U.S. 35, 41, 108 S. Ct. 1625, 1629 (1988)). In this context, the court addressed the

questions of whether McDonald had a reasonable expectation of privacy in her luggage, and whether the officers' actions infringed on that privacy. *See id.* at 1325. The court considered the following factors: 1) the defendant was on a common carrier; 2) she placed her bags in an overhead rack that was accessible to other passengers; and 3) it was very likely that the other passengers would move, touch or push her bags. *Id.* at 1326. The Seventh Circuit panel concluded:

> [The defendant] knowingly and voluntarily exposed the exterior of her bags to being physically touched by other persons ... [Accordingly] she did not have a reasonable expectation of privacy that the exterior of her luggage would not be felt, handled, or manipulated by others.

McDonald, 100 F.3d at 1326.

The court analyzed the police officer's actions towards defendant's luggage. It focused on the degree of intrusiveness the police officers used in handling defendant's bags, holding:

> The type of investigation employed ... was tailored to reveal only limited information without displaying the contents of the bags to anyone. Specifically, as with the canine sniff ... the physical touching and feeling of [defendant's] soft-sided luggage by an experienced detective, who over the years had acquired extensive knowledge of illicit drug trafficking, was not likely to reveal much information beyond raising to a high degree the officer's suspicion that the bags contained drugs ...

Id. at 1326. The court also considered the fact that the officers did not move the bags when they initially touched them. In

addition, the court held that the police officer's "touching of the luggage was no more intrusive than the now routine x-raying of all carry-on luggage at airports." *Id.* at 1327.

Hence, the appellate court in *McDonald* affirmed the district court's denial of the defendant's suppression motion, holding that the defendant did not have an expectation of privacy in the bags she placed in the overhead rack, and that the officers' touching of those bags was not a search for purposes of the Fourth Amendment. *Id.* at 1326. S*ee also United States v. Gault*, 92 F.3d 990 (10th Cir. 1996) (holding that "the officer's manner of handling the bag was the sort that a traveler . . . might expect"), and *United States v. Most*, 876 F.2d 191 (D.C. Cir. 1989) (holding that the officer did not handle the defendant's bag in a manner consistent with his expectations as a passenger).

In the instant case, the Border Patrol agent did no more than the officers in *McDonald, Guzman, and Lovell*. Upon boarding the bus, the agent began checking identifications for proof of citizenship or permanent residency. Once satisfied, he started to exit the bus, touching and squeezing the luggage in the overhead compartment as he exited. When he squeezed Petitioner Bond's bag he felt a hard brick-like object and asked Petitioner Bond if he could search his bag. Petitioner Bond agreed and the Border Patrol agent found a brick of methamphetamine.

Therefore, for the foregoing reasons, Petitioner Bond had no reasonable expectation of privacy in a bag which he placed in an overhead compartment on a common carrier. The Border Patrol agent's initial contact with Petitioner Bond's bag was minimal and unintrusive, designed only to reveal contraband. The agent's contact with the bag was no more intrusive than the potential contact which could have occurred by any passenger on the bus. Thus, the methamphetamine was discovered pursuant to an effective and constitutional method of investigation, which left intact Petitioner Bond's Fourth Amendment right to be free from unreasonable searches and seizures.

II. In determining what is reasonable under the Fourth Amendment, the individual's right to privacy is balanced against the need for effective law enforcement. To circumvent drug interdiction efforts near the border or on the open seas, drug traffickers resort to various modes of transportation, depending on where law enforcement is placing the greatest pressure, based on available resources. As a means of uncovering drugs covertly transported via common carriers, effective law enforcement requires that law enforcement officers be able to touch or handle items in transport, which are open to the public's view, touch, and handling.

The reasonableness of a search and seizure under the Fourth Amendment depends on a balancing between the individual's right of privacy and the public's interest in effective law enforcement. In addition to being constitutionally valid, the Border Patrol agent's actions in this case comported with current law enforcement needs.

Stopping the importation of illegal drugs into the United States is a major duty of law enforcement officers to combat the ever increasing quantities of unlawful drugs that are being smuggled into the United States from Mexico, as recently confirmed in the following news story:

> Mexico City — Cocaine and marijuana seizures inside the southwestern U.S. border and along Mexico's Pacific coast have escalated dramatically in the past two years, alarming U.S. law enforcement authorities who say Mexican traffickers are sending greater quantities and larger loads of drugs into the United States. ... Between 1991 and 1998, seizures have jumped from 113 tons to 720 tons [of cocaine, for example]. ...
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> ...
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> The rising number of seizures reflects not only

> greater smuggling activity but also dramatic increases in drug production in Columbia and Mexico, according to U.S. officials and reports from law enforcement agencies. U.S. authorities estimated that they capture 10 to 15 percent of all drugs smuggled into the country. While many officials credited improved coordination among U.S. law enforcement agencies for the increase in seizures, they said the trend clearly indicates more drugs are arriving in the United States.
>
> ...
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> "The drug groups are flexible and innovative and are using ever more sophisticated and well-organized counter-surveillance and counterintelligence," according to a new U.S. government intelligence assessment. "They are constantly ... identifying and explaining law enforcement predictability, patterns, weaknesses, vulnerabilities and routines."

Molly Moore, *Drug Busts Rise on Mexican Border*, WASHINGTON POST (online), November 29, 1999, at 1 & 2. In fact, experts estimate that 50 to 70 percent of the cocaine smuggled into the United States is transported by land through Mexico and usually across the southwest border. General Accounting Office, *Drug Control: Observations and Elements of the Federal Drug Control Strategy*, Letter Report, 3/14/97, GAO/GGD-97-42.

Moreover, it is common knowledge that drug cartels have immense resources and vast networks with which to conduct this smuggling and trafficking and can adapt quickly using different means of transport.

> Drug traffickers are adaptable, reacting to interdiction successes by shifting routes and changing modes of transportation. Large

> international criminal organizations have extensive access to sophisticated technology and resources to support their illegal operations. The United States must surpass traffickers' flexibility, quickly deploying resources to changing high-threat areas. Consequently, the U.S. Government designs coordinated interdiction operations that anticipate shifting trafficking patterns.

Executive Office of the President, United States of America, *1999 National Drug Control Strategy*, excerpt from Part IV, "A Comprehensive Approach", Chapter 7, "Reducing the Supply of Illegal Drugs".[3]

Drug traffickers are increasingly utilizing buses to transport drugs, and if law enforcement efforts are to be effective, this mode of transporting drugs must be made more difficult through such efforts.

> Given the unfortunate realities of today's world, where law enforcement authorities must combat a steady influx of illicit drugs . . . It is not surprising that over the last few decades our society has accepted increased security measures . . . at many locations such as airports, courthouses, hospitals, and even schools. In light of these realities, we agree with other courts of appeal that have held that the reasonable expectation of privacy inherent in the contents of luggage is not compromised by a police officer's physical touching of the exterior of luggage left exposed in the overhead rack of a bus.

McDonald, 100 F.3d at 1325.

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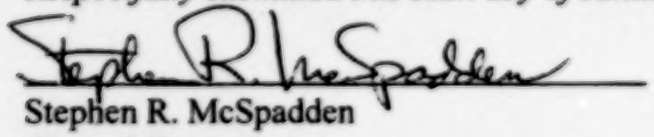
[3]This report is found at the following Internet web site: <www.whitehousedrugpolicy.gov/policy/99ndcs> on the Internet.

In summary, the privacy rights of individuals under the Fourth Amendment must be balanced against the needs of law enforcement. To effectively fulfill the awesome responsibility of enforcing the Nations' laws and keeping the peace, the balance must occasionally tip in the favor of law enforcement, especially when the intrusion on a person's privacy is so minimal that it does not qualify as unreasonable under the Fourth Amendment. Consequently, it is imperative that federal, state, and local law enforcement officers have effective investigatory measures at their disposal; touching bags exposed to the public on a common carrier is one such investigatory measure.

CONCLUSION

Amicus curiae urges the Court to take into account this legitimate societal interest in detecting shipments of illegal drugs on public carriers of transport, and then to hold that a law enforcement officer's touching of the outside of a bag of luggage, placed in a public space on a common carrier and open to feel, touch, or other handling by the public, does not intrude on a reasonable expectation of privacy under the Fourth Amendment. To hold otherwise would be tantamount to giving any illicit drug a free, unfettered bus ride within the United States, a price society should not have to pay. Therefore, we respectfully request that the Court affirm the decision of the Fifth Circuit.

Respectfully submitted this sixth day of January 2000,



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